TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1930

~~No. 730~~ 19

LETUS N. CROWELL, AS DEPUTY COMMISSIONER FOR THE SEVENTH COMPENSATION DISTRICT OF THE UNITED STATES EMPLOYEES' COMPENSATION COMMISSION, PETITIONER

vs.

CHARLES BENSON

~~No. 781~~ 20

LETUS N. CROWELL, AS DEPUTY COMMISSIONER FOR THE SEVENTH COMPENSATION DISTRICT OF THE UNITED STATES EMPLOYEES' COMPENSATION COMMISSION, AND J. B. KNUDSEN, PETITIONERS

vs.

CHARLES BENSON

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITIONS FOR CERTIORARI FILED FEBRUARY 12, 1931
CERTIORARI GRANTED MARCH 16, 1931

(35652, 35653)

SUPREME COURT OF THE UNITED STATES

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No. 730

LETUS N. CROWELL, AS DEPUTY COMMISSIONER FOR THE SEVENTH COMPENSATION DISTRICT OF THE UNITED STATES EMPLOYEES' COMPENSATION COMMISSION, PETITIONER

vs.

CHARLES BENSON

No. 731

LETUS N. CROWELL, AS DEPUTY COMMISSIONER FOR THE SEVENTH COMPENSATION DISTRICT OF THE UNITED STATES EMPLOYEES' COMPENSATION COMMISSION, AND J. B. KNUDSEN, PETITIONERS

vs.

CHARLES BENSON

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

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A [Caption omitted.]
1 [Caption omitted.]

2 In United States District Court for the Southern District of Alabama

CHARLES BENSON, COMPLAINANT

VS.

LETUS N. CROWELL, DEPUTY COMMISSIONER, ET AL., RESPONDENTS

In Equity No. 125

Bill of complaint.

Filed Jan. 24, 1929

To the Honorable ROBERT T. ERVIN, *Judge of the United States District Court for the Southern District of Alabama, in Equity:*

Now comes Charles Benson, of Mobile, in the couty of Mobile, State of Alabama, and files this bill of complaint against Letus N. Crowell, Esq., deputy commissioner for the seventh compensation district, appointed and acting under and by virtue of the act of Congress known as the longshoremen's and harbor workers compensation act, and against J. B. Knudsen, and respectfully shows unto your honor as follows:

1. That the complainant Charles Benson is over twenty-one (21) years of age, and is a resident of the city and county of Mobile, in the State of Alabama, and is the sole proprietor of and does business under the name and style of Benson Sheet Iron & Metal Works.

2. That the respondent Letus N. Crowell is over twenty-one
3 (21) years of age, and is the deputy commissioner in and for the seventh compensation district, established pursuant to the act of Congress approved March 4th, 1927, and known as the longshoremen's and harbor workers' compensation act, and that the respondent J. B. Knudsen is over the age of twenty-one (21) years, and is a resident of the city and county of Mobile, in the State of Alabama, and that the county of Mobile in the State of Alabama is situate within the said seventh compensation district.

3. That on the 4th day of July, 1927, the said J. B. Knudsen, while standing on a derrick barge belonging to this complainant and then moored in the Mobile River, a navigable stream, at a point in said stream opposite to the city of Mobile in Mobile County, Alabama, was struck, knocked down, and seriously injured by certain tackle which fell or gave away by reason of the breaking of that portion of the wharf to which it was fastened, and that thereafter on the 31st day of May, 1928, the said J. B. Knudsen filed with the said deputy commissioner a claim against the complainant, in which he demanded compensation on account of said injuries under the longshoremen's and harbor workers' compensation act. A copy of the claim filed by the said J. B. Knudsen as aforesaid is hereto attached,

marked "Exhibit A," and now referred to. Thereafter, on the 9th day of June, 1928, this complainant filed with the said deputy commissioner his answer to said claim of the said J. B. Knudsen, a copy of which said answer is hereto attached, marked "Exhibit B," and made a part hereof. Thereafter the deputy commissioner ordered a hearing in respect to the said claim and on, to-wit, the 22nd day of November, 1928, the matter of said claim was heard at Mobile, Alabama, before the said Letus N. Crowell as deputy commissioner of the said seventh compensation district, and after said hearing,

4 and on December 26th, 1928, the said deputy commissioner filed in his office an award and compensation order by which this complainant was required to pay compensation to the said J. B. Knudsen for the disability which he had incurred by reason of said injury which said award and compensation order, if valid, would become effective as of the date when the same was filed, viz: On the 26th day of December, 1928. A copy of said award is hereto attached, marked "Exhibit C," and here referred to.

4. This complainant alleges, however, that the said award and compensation order was not in accordance with law, for the reason that the said J. B. Knudsen was not at the time of said injury an employee of the complainant, nor was the matter of his claim against this complainant within the jurisdiction of the said deputy commissioner. The said J. B. Knudsen had previously cut a cable on said derrick barge, and on the date of his injury aforesaid he returned to the said derrick barge for the purpose of splicing said cable, but not as an employee of this complainant, and it was while he was making preparation to splice that cable that he was injured.

Complainant alleges that when said Knudsen cut said cable he was not in the employ of complainant, unless it was in the capacity of member of the crew of said derrick barge, in which capacity he served until, to-wit, June 15, 1927, when he left complainant's employ. Said cable was cut by said Knudsen during the period of his employment as a member of the crew of said derrick barge, but after said derrick had been loaned by complainant to Knudsen and/or one Beauregard Roberts, as an act of friendship to enable them to do certain work of their own, and complainant claimed said cable was erroneously or improperly cut and that it was by reason of said cutting rendered less valuable or useful to complainant, and that therefore said Roberts and/or Knudsen was or were under an obli-

5 gation to have said damage to the cable repaired by splicing, and complainant avers that said Knudsen, on the occasion of his said injury on July 4, 1927, went on board of said derrick for the purpose of splicing, and was preparing to splice said cable at the instance of said Roberts and/or as an act of reparation for the damage done or claimed to have been done complainant in its cutting and without any agreement with this complainant, express or implied, that said Knudsen would be paid by this complainant for doing so, but the complainant further avers that if he be mistaken

in the allegation that there was no implied agreement that said J. B. Knudsen would be compensated by complainant for splicing said cable, then he alleges the fact to be that said J. B. Knudsen undertook to do said work either as an independent contractor or as a member of the crew of said derrick.

5. This complainant alleges that since the filing by the said J. B. Knudsen of his claim against this complainant for compensation under the said longshoremen's and harbor workers' act, the said J. B. Knudsen, on, to-wit, July 2, 1928, filed a suit at law in the Circuit Court of Mobile County, Alabama, against this complainant, claiming $15,000.00 damages for the identical injury on which his said claim under the longshoremen's and harbor workers' compensation act is based, and that said suit is still pending in said court. This complainant alleges that he had not at the time of Knudsen's said injury secured the payment of compensation to his employees as required by section 32 of said longshoremen's and harbor workers' compensation act, and that by the filing of said suit, the said J. B. Knudsen did elect not to maintain his claim for compensation under said longshoremen's and harbor workers' compensation act, but to maintain his action at law for damages on account of said injury, and that therefore, the said J. B. Knudsen is not now entitled to any compensation under said longshoremen's and harbor workers' compensation act.

6 6. Under the terms of the award aforesaid, made by the respondent deputy commissioner, this complainant will be required, unless payment of the amounts required by said award be stayed, pending final decision in this cause, to presently pay to the said J. B. Knudsen a large sum of money, to-wit, $1,538.40, or more, as accrued compensation, and additional compensation thereafter of $19.23 per week until full payment of the amount of said award, and complainant alleges that the said J. B. Knudsen is utterly insolvent and has no assets or property of any kind or character, and that if this complainant should pay the aforesaid accrued compensation which he is required to pay by the terms of said award, he will be unable to recover such accrued compensation or any part thereof, and will sustain irreparable loss and damage.

Prayer for process

Wherefore, the premises considered, this complainant prays that the said Letus N. Crowell, deputy commissioner for the seventh compensation district, established under and pursuant to the longshoremen's and harbor workers' compensation act, and the said J. B. Knudsen may be made parties defendant to this bill of complaint, and that process in the usual form issue to and be served upon them and each of them requiring them to appear and make answer to this bill of complaint within the time and in the manner required by law and the rules of this honorable court.

Prayer for relief

And complainant prays that this his bill of complaint may be treated and considered as also his application for an interlocutory injunction to stay payment of the amounts which he is re
7 quired by said award to pay, and that your honor, after giving three days' notice to the parties respondent to this bill, will grant him an interlocutory injunction, staying payment of the amounts which he is required to pay by the terms of said award, until the final decision of this cause, and complainant further prays that on the final hearing of this cause your honor will restrain and forever enjoin the enforcement of said award as contrary to law, and decree that the said award is illegal and invalid, and set aside the same, and this complainant prays for such other and further or different order, decree and relief as the equity of the cause may justify.

OUTLAW, KILBORN & SMITH,
HARRY T. SMITH & CAFFEY,
Solicitors for Complainant.

Footnote: Each of the defendants, Letus N. Crowell and J. B. Knudsen, is required to answer each and every allegation of the above and foregoing complaint, from paragraph first to paragraph sixth, both inclusive, but not under oath, oath as to each of such answers being hereby expressly waived.

OUTLAW, KILBORN & SMITH,
HARRY T. SMITH & CAFFEY,
Solicitors for Complainant.

Duly sworn to by Charles Benson; jurat omitted in printing.

8 *Exhibit A to bill of complaint*

United States. Employees' Compensation Commission, office of Deputy Commissioner Letus N. Crowell, Case No. 93–1, administering longshoremen's and harbor workers' compensation act.

EMPLOYEES CLAIM FOR COMPENSATION

(To be filed with the deputy commissioner in accordance with sections 13 and 19 of the law)

1. Name of employee: J. B. Knudsen.
2. Address: Street and No.: U. S. Marine Hospital, City or town, Mobile.
3. Sex: Male. Age, 55. Married, single, widowed: Single.
4. Do you speak English? Yes. Nationality: Norwegian.

9 Injured person:

5. State regular occupation. Rigger, ship construction, diver.
6. What were you doing when injured? Preparing to splice fall.
7. (a) Wages or average earnings per day, $5.00. (Include overtime, board, rent, and other allowances. (b) Per week, $30.00. (c) Were you employed elsewhere during week in which you were injured? No.

8. Were you paid full wages for day of accident? Nothing.

Employer:

9. Employer, Charles Benson, Benson Sheet Iron & Metal Works.

10. Office address: Street and No.: NW. Water & Palmetto. City or town: Mobile.

11. Nature of business: Barge owner, ship repair.

The injury:

12. Place where injury occurred: Derrick barge Chickasaw, Pinto Island, Mobile Co.

13. Name of foreman:

14. Date of accident or first illness, the 4th day of July, 1927, at about 10 o'clock a. m.

15. How did accident happen or how was occupational disease caused? Was struck and knocked down on barge when tackle, made fast to wharf, let go, upon part of wharf to which tackle was fastened, breaking loose.

Nature and extent of injury:

16. State fully nature of injury or occupational disease: Fracture right femur, supercondylar with posterior displacement and vertical intracondylar fracture also.

17. On what date did you stop work because of injury? July 4, 1927.

18. Have you returned to work? (Yes or No) No.

19. Does injury keep you from work? (Yes or No) Yes.

20. Have you done any work in period of disability? No.

21. Have you received any wages since injury? No.

22. Has injury resulted in amputation? No.

23. Did you request your employer to provide medical attendance? Don't know. Was completely disabled by injury. Has he done so? No.

24. Attending physician: Name, U. S. Marine Hospital. Address: Mobile.

25. Hospital:

Notice:

26. Have you given your employer notice of injury? (Yes or No) Yes; by B. Roberts. When? July 4, 1927, and May 29, 1928.

27. If such notice was given, to whom? Charles Benson, Benson Sheet Iron & Metal Works.

28. Was it given orally or in writing? First notice oral, second in writing.

I hereby present my claim to the deputy commissioner for compensation for disability resulting from an injury arising out of and in the course of my employment and not occasioned solely by intoxication, or by my willful intention, and in support of it I make the foregoing statement of facts.

(Signed by) J. B. KNUDSEN,
Claimant.

Mail address, U. S. Marine Hospital, Mobile, Ala.

Dated May 29, 1928.

11 *Exhibit B to bill of complaint*

United States Employees' Compensation Commission, office of Deputy Commissioner Letus N. Crowell Case No. 93–1, Administering Longshoremen's and Harbor Workers' Compensation Act

ANSWER OF EMPLOYER OR INSURANCE CARRIER TO EMPLOYEE'S CLAIM FOR COMPENSATION

J. B. KNUDSEN, CLAIMANT

VS.

CHARLES BENSON—BENSON SHEET IRON & METAL WORKS, EMPLOYER

The employer or insurance carrier above named for answer to the claim respectfully shows:

1. It is admitted that applicant sustained an injury on or about the date set forth in the application.

2. It is denied that both the employer and employee were subject to the longshoremen's and harbor workers' compensation act at the time of the alleged injury.

3. It is denied that the relationship of employer and employee existed at the time of the injury.

4. It is denied that at the time of the alleged injury the employee was performing service growing out of an incidental to his employment.

5. It is admitted that notice of injury was given employer as specified in application.

6. It is denied that applicant was permanently disabled to the extent stated in application.

12 7. It is admitted that applicant was temporarily disabled for the period stated in application.

8. It is denied that the rate of wages as set forth in application is correct.

9. It is denied that at the time claimant received the injury in question he stood in such relationship to the undersigned as to render the undersigned liable for compensation under the longshoremen's and harbor workers' compensation act.

(Signed) CHAS. BENSON,
Benson Sheet Iron & Metal Works.

NOTE.—The employer or insurance carrier should answer the claim within ten days from the date that a copy of it is served upon him. The original answer should be mailed to the deputy commissioner at the above address and a copy thereof served upon the claimant either personally or by mailing to the address in the claim.

Exhibit C to bill of complaint

United States Employees' Compensation Commission, Seventh Compensation District. In the matter of the claim for compensation under the longshoremen's and harbor workers' compensation act, J. B. Knudsen, Claimant, against Charles Benson and/or Benson Sheet Iron & Metal Works, Employer. Compensation order award of compensation. Case No. 93–1.

13 Such investigation in respect to the above-entitled claim having been made as is considered necessary, and

A hearing having been held in conformity with law, the deputy commissioner makes the following

Findings of fact

That on the 4th day of July, 1927, the claimant above named was in the employ of the employer above named, in Mobile County, in the State of Alabama, in the seventh compensation district, established under the provisions of the longshoremen's and harbor workers' compensation act; that at said time the employer had not secured the payment of compensation under said act; that on said day claimant herein, while performing service for the employer upon the navigable waters of the United States sustained personal injury resulting in his disability while he was employed as a rigger preparing to splice a wire fall on a vessel while said vessel was floating upon said waters, the fall broke loose, striking him, and knocking him down and dragging him with his right lower extremity caught, resulting in partially ankylosed right knee, fracture of right femur with posterior displacement, with 1¾-inch shortening of said extremity.

That the employer had notice and knowledge of said injury as provided by said act.

That the medical, surgical, and hospital treatment required in the attempt to completely cure and relieve the claimant from effects of said injury was furnished by the marine hospital at Mobile, Alabama, for which treatment said hospital is going to make no charge.

That the average annual earnings of the claimant at the time of said injury amounted to the sum of $1,500.00.

That as a result of said injury the claimant sustained temporary total disability from July 4, 1927, to November 22, 1927, both dates inclusive, covering a period of 72 4/7s weeks, and he is entitled to 72 4/7s weeks' compensation for such disability at the rate of $19.32 a week.

14 That as a result of said injury claimant has a permanent partial disability consisting of 65% (sixty-five per cent) loss of use of his right leg.

That the difference between 40 weeks and said 72 4/7s weeks is 32 4/7s weeks, which when added to 288 weeks makes 320 4/7s; that 72 4/7s weeks deducted from 320 4/7s weeks equals 248 weeks, and 65% of 248 weeks equals 161.2 weeks, and the claimant is entitled to 161.2 weeks' compensation for such permanent partial disability at the rate of $19.23 a week.

That Attorneys Pillans, Cowley, and Gresham, the claimant's attorneys, have rendered legal services to said claimant and the reasonable value of such services is the sum of $630.00 which is approved by the deputy commissioner in said sum; that said attorneys are entitled to a lien upon award for compensation in said sum of $630.00.

Upon the foregoing facts the deputy commissioner makes the following

Award

That the employer, Charles Benson and/or Benson Sheet Iron & Metal Works, shall pay to the claimant, J. B. Knudsen, compensation as follows:

The sum of $19.23 a week beginning July 4, 1927 for 233-27/35 consecutive weeks, less $630.00 payable direct to Attorneys Pillans, Cowley & Gresham.

Given under my hand at New Orleans, Louisiana, this 26th day of December, 1928.

(Signed) LETUS N. CROWELL,
Deputy Commissioner Seventh Compensation District.

LNC:mt

[File endorsement omitted.]

15 In United States District Court

[Title omitted.]

Order fixing date for the hearing of application for interlocutory injunction

Filed January 24, 1929

On reading the application for an interlocutory injunction against the respondents in the above entitled cause, as embodied in the bill of complaint therein, it is ordered that the hearing of said application for an interlocutory injunction be and the same is hereby set for 10 o'clock on the 1st day of February, 1929, and that the clerk issue a written notice to the parties in interest of said application and of the date set for the hearing thereof, and cause the same to be served on said parties at least three days in advance of the time appointed for the hearing.

Done this 24th day of January, 1929.

ROBERT T. ERVIN,
Judge, United States District Court.

[File endorsement omitted.]

16 In United States District Court

[Title omitted.]

Notice of hearing

Filed January 25, 1929

The President of the United States of America, to Letus N. Crowell, deputy commissioner, and J. B. Knudsen, greeting:

You and each of you is hereby notified that the hearing on the application for an interlocutory injunction against you in the above entitled cause, as embodied in the bill of complaint therin, is set for 10 o'clock a. m., on the 1st day of February, A. D. 1929, in the United States District Court for the Southern District of Alabama, in Mobile, Alabama.

The United States marshal, or any of his deputies, will serve this notice and make due return thereof according to law.

Witness the honorable Robert T. Ervin, judge of the District Court of the United States for the Southern District of Alabama, and the seal thereof at Mobile, Alabama, this the 24th day of January, A. D. 1929.

[SEAL.] VIRGIL C. GRIFFIN,
Clerk.
By SARAH G. GRIFFIN,
Chief Deputy Clerk.

Issued January 24th, 1929. Returnable February 1st, 1929.

17 5-2707-186. Recd in office 1-24-29. (90)

Executed by personal service of this writ on each party named within. 1-24-29.

JAMES A. STAFFORD,
U. S. Marshal.
By D. S. PENNINGTON,
Deputy.

[File endorsement omitted.]

In United States District Court

[Title omitted.]

Subpoena and return

Filed Jan. 25, 1929

The President of the United States of America, to Letus N. Crowell, deputy commissioner in and for the seventh compensation district, and J. B. Knudsen, a resident of the city and county of Alabama, and within the Southern District of Alabama, greetings:

18 You are hereby commanded to be and appear before this honorable court at the city of Mobile, Alabama, on or before the twentieth (20th) day after the service of this writ upon you,

then and there to answer unto the petition for injunction filed herein against you by Charles Benson, a resident of the city and county of Mobile, Alabama, the sole proprietor of and doing business under the name and style of Benson Sheet Iron and Metal Works, under the penalty of the law ensuing.

The United States marshal, or any of his deputies for the Southern District of Alabama, will execute this writ and make due return thereof according to law.

Witness the honorable Robert T. Ervin, judge of the District Court of the United States for the Southern District of Alabama, and the seal thereof at the city of Mobile, Alabama, this the 24th day of January, A. D., 1929.

[SEAL.] VIRGIL C. GRIFFIN,
Clerk.
By SARAH G. GRIFFIN,
Chief Deputy Clerk.

Memorandum: The defendants are required to file their answer or other pleadings in the clerk's office at Mobile, Alabama, on or before the 20th day after service, excluding the day thereof, otherwise the bill may be taken pro confesso.

[SEAL.] VIRGIL C. GRIFFIN,
Clerk.
By SARAH G. GRIFFIN,
Chief Deputy Clerk.

Issued January 24, 1929. Returnable 20 days, etc.

5-2707-186. Recd in office 1-24-29. (90)

19 Executed by personal service of this writ on each party named within. 1-24-29.

JAMES A. STAFFORD,
U. S. Marshal.
By D. S. PENNINGTON,
Deputy.

[File endorsement omitted.]

In United States District Court

[Title omitted.]

Pauper affidavit and order

Filed Feb. 1, 1929

STATE OF ALABAMA,
County of Mobile, ss:

J. B. Knudsen, being duly sworn according to law deposes and says that he is one of the respondents in the above-entitled action;

that he is a citizen of the United States, and that because of his poverty he is unable to pay the costs of said action or to give security therefor.

J. B. KNUDSEN.

Sworn to and subscribed before me this 1 day of February, 1929.

VIRGIL C. GRIFFIN,
Clerk.

Order of court

It is ordered that the said respondent in the above-entitled action be and he hereby is permitted to defend said action to conclusion without prepayment of fees or costs.

ROBERT. T. ERVIN,
District Judge.

Dated: February 1, 1929.
[File endorsement omitted.]

In United States District Court

[Title omitted.]

Order granting interlocutory injunction

Filed Feb. 7, 1929

The complainants application for an interlocutory injunction and the evidence in support thereof having been heard and considered by the court on February 1st, 1929, and at that time taken under consideration by the court, the court now finds and adjudges, based upon the evidence submitted to the court at the said hearing, which evidence consists of the admission in open court by counsel for the respondent J. B. Knudsen that said Knudsen is insolvent, and of the testimony of the said J. B. Knudsen to the effect that he is utterly insolvent and has no income or property of any kind or character, that the said Knudsen is insolvent, and that irreparable damage would ensue to the complainant Charles Benson, unless the complainant's application for an interlocutory injunction be granted. The court further finds and adjudges that the nature of said irreparable damage to the complainant Benson which would result unless said application for an interlocutory injunction should be granted is this: That unless said interlocutory injunction should be granted the complainant Charles Benson would be forced under the terms of said award to presently pay to the respondent J. B. Knudsen a large sum of money, to-wit, $1,538.40, or more, as accrued compensation, and additional compensation thereafter of $19.23 per week until full payment of the amount of the award referred to in the bill of complaint, and that if the complainant Charles Benson should pay the said Knudsen the sum of $1,538.40, or

any amount, in pursuance of the requirements of said award, and if it should be determined that the said award is contrary to law as alleged in the bill of complaint, the complainant Charles Benson, on account of the insolvency of respondent J. B. Knudsen, would be unable to recover the said monies or any part thereof.

The court is therefore of the opinion that the complainant's application for an interlocutory injunction should be granted upon his entering into bond in the sum of $5,000.00 with surety to be approved by the clerk of this court, said bond to be conditioned to pay the said J. B. Knudsen all such amounts as may be ascertained by the
22 final decision in this cause to be due or payable to him by the complainant Charles Benson under the provisions of the longshoremen's and harbor workers' compensation act, as compensation for the injuries alleged to have been sustained by him on July 4th, 1927, together with all such costs as may be decreed against the said Charles Benson in this cause.

And the complainant now appearing and giving said bond, and the same being approved by the clerk, it is now therefore accordingly considered, ordered, adjudged, and decreed by the court that the complainant's said application for an interlocutory injunction be and the same is hereby granted, and the respondents Letus N. Crowell, as deputy commissioner for the seventh compensation district, and J. B. Knudsen, are each hereby enjoined and restrained, until the final decision and disposition of this cause, from enforcing the award referred to in the bill of complaint, as having been made on December 26th, 1928, by the respondent Letus N. Crowell in favor of the respondent J. B. Knudsen and against the complainant Charles Benson, and from collecting or exacting the payment of any of the amounts required to be paid by the complainant Charles Benson by the terms of said award.

Done this 7th day of February, 1929.

ROBERT T. ERVIN,
Judge, United States Court, Southern District of Alabama.

[File endorsement omitted.]

23 In United States district court

[Title omitted.]

Motion of deputy commissioner to dismiss bill

Filed Feb. 7, 1929

To the honorable ROBERT T. ERVIN, *Judge of the District Court of the United States for the Southern District of Alabama, in Equity:*

Now into court, through the United States attorney for the southern district of Alabama, Alex C. Birch, comes Letus N. Crowell, deputy commissioner, United States Employees' Compensation Com-

mission for the seventh compensation district, and moves the court to dismiss the bill of complaint filed herein by Charles Benson, on the following grounds, separately and severally:

1. Because it does not appear from the facts alleged that the compensation order, prayed to be enjoined, was not entered in accordance with law.

2. The facts alleged do not show that there was no competent evidence before the deputy commissioner to support his order sought to be enjoined.

3. For aught that appears, the evidence before the deputy commissioner was in conflict, and the order complained of was based on the deputy commissioner's findings on disputed issues of fact, which findings are supported by competent evidence.

4. Because of the findings of the deputy commissioner on issues of fact are conclusive, unless there is no competent evidence to sustain such findings; and, for aught alleged, evidence was offered to sustain such findings.

5. Because it appears that the order sought to be enjoined was an order of an officer of the administrative department of the Federal Government; and it is not alleged that there was no competent evidence before said officer to support his findings upon which the order sought to be enjoined is based.

6. Because the bill of complaint does not set forth, in whole or in part, the evidence or proof which was submitted to the deputy commissioner at the hearing on which the order, prayed to be enjoined, was entered.

And this respondent further moves the court to strike paragraph four of said bill of complaint, and to dismiss said bill of complaint in so far as the same is grounded upon the matters and things alleged in the fourth paragraph thereof, on the following grounds, separately and severally:

a. The allegation that the respondent Knudsen undertook the work referred to in paragraph four of the bill of complaint as an independent contractor, is an allegation of a conclusion of the pleader, and facts are not alleged showing the relation to have been that of independent contractor.

b. The allegation that the respondent Knudsen undertook to do the work referred to in paragraph four of the bill of complaint as a member of the crew is alleged as but a conclusion of the pleader, and facts are not set forth showing that said respondent was a member of the crew at the time of the injury.

c. Because paragraph four is uncertain and indefinite as to how or in what way the alleged relationship of independent contractor existed.

d. Paragraph four of said bill of complaint is uncertain and indefinite as to how or in what way the alleged relationship of member of the crew existed.

And this respondent further moves the court to strike paragraph five of said bill of complaint, and to dismiss said bill

of complaint, insofar as the same is grounded upon the matters and things alleged in the fifth paragraph thereof, on the following grounds, separately and severally:

a. Because it appears that the respondent Knudsen proceeded under the longshoremen and harbor workers act, and suit was filed by him in the circuit court of Mobile County, Alabama.

b. Because it does not appear that at the time of filing suit in the circuit court the respondent Knudsen knew that complainant had not secured payment of compensation, as alleged in the fifth paragraph of said bill.

c. Because it is not made to appear that the respondent Knudsen had, at the time of the alleged election, a remedy actually existing in the circuit court of Mobile County, Alabama.

d. It does not appear that, at the time of the alleged election, respondent Knudsen had in fact two or more coexisting remedies.

e. It is not made to appear that, at the time of the alleged election, the respondent Knudsen had knowledge of the facts.

f. Because it is not made to appear that the facts introduced in evidence before the deputy commissioner at the time of the hearing showed the matters and things set forth in the fifth paragraph; or that the insistence set forth in said paragraph that respondent Knudsen had elected not to proceed under said Act was ever made before the deputy commissioner or every passed on by him.

g. For aught that appears, complainant is now for the first time in his bill praying an injunction, setting up the alleged defense of election, as set forth in said paragraph five; and that complainant did not seek nor urge said insistence, nor produce evidence of
26 the allegation of said fifth paragraph in the hearing before the deputy commissioner.

ALEX C. BIRCH,
United States Attorney, appearing herein for the Respondent, Letus N. Crowell.

[File endorsement omitted.]

In United States District Court

[Title omitted.]

Motion of Knudsen to Dismiss Bill

Filed Feb. 14, 1929

To the Honorable ROBERT T. ERVIN, *Judge of the District Court of the United States for the Southern District of Alabama, in Equity:*

The respondent, J. B. Knudsen, moves to dismiss the bill of complaint filed herein by Charles Benson, on the following grounds, separately and severally:

1. Because it does not appear from the facts alleged that the compensation order, prayed to be enjoined, was not entered in accordance with law.

2. The facts alleged do not show that there was no competent evidence before the deputy commissioner to support his order sought to be enjoined.

3. For aught that appears, the evidence before the deputy commissioner was in conflict, and the order complained of was based on the deputy commissioner's findings on disputed issues of fact, which findings are supported by competent evidence.

4. Because the findings of the deputy commissioner on issues of fact are conclusive, unless there is no competent evidence to sustain such findings; and, for aught alleged, evidence was offered to sustain said findings.

5. Because it appears that the order sought to be enjoined was an order of an officer of the administrative department of the Federal Government; and it is not alleged that there was no competent evidence before said officer to support his findings upon which the order sought to be enjoined is based.

And said respondent further moves the court to strike paragraph four of said bill of complaint, and to dismiss said bill of complaint insofar as the same is grounded upon the matters and things alleged in the fourth paragraph thereof, on the following grounds, separately and severally:

a. The allegation that this respondent undertook the work referred to in paragraph four of the bill of complaint as an independent contractor is an allegation of a conclusion of the pleader, and facts are not alleged showing the relation to have been that of independent contractor.

b. The allegation that this respondent undertook to do the work referred to in paragraph four of the bill of complaint, as a member of the crew, is alleged as but a conclusion of the pleader, and facts are not set forth showing that this respondent was a member of the crew at the time of the injury.

c. Because paragraph four is uncertain and indefinite as to how or in what way the alleged relationship of independent contractor existed.

d. Paragraph four of said bill of complaint is uncertain and indefinite as to how or in what way the alleged relationship of member of the crew existed.

And said respondent further moves the court to strike paragraph five of said bill of complaint, and to dismiss said bill of complaint insofar as the same is grounded upon the matters and things alleged in the fifth paragraph thereof, on the following grounds, severally and separately:

a. Because it appears that this respondent proceeded under the longshoremen and harbor workers acts, and suit was filed by him in the circuit court of Mobile County.

b. Because it does not appear that at the time of filing suit in the circuit court this respondent knew that complainant had not secured

payment of compensation, as alleged in the fifth paragraph of said bill.

c. Because it is not made to appear that this respondent had at the time of the alleged election a remedy actually existing in the circuit court of Mobile County, Alabama.

d. It does not appear that, at the time of the alleged election, this respondent had in fact two or more coexisting remedies.

e. It is not made to appear that, at the time of the alleged election, this respondent had knowledge of the facts.

f. Because it is not made to appear that the facts introduced in evidence before the deputy commissioner at the time of the hearing showed the matters and things set forth in the fifth paragraph; or that the insistence set forth in said paragraph that this respondent had elected not to proceed under said act was ever made before the deputy commissioner or ever passed on by him.

g. For aught that appears, complainant is now for the first time in his bill praying an injunction, setting up the alleged defense of election, as set forth in said paragraph five; and that complainant did not seek nor urge said insistence, nor produce evidence of
29 the allegation of said fifth paragraph in the hearing before the honorable deputy commissioner.

PILLANS, COWLEY & GRESHAM,
Solicitors for J. B. Knudsen.

[File endorsement omitted.]

In United States District Court

[Title omitted.]

Order of submission on motion to dismiss

Filed Mar. 18, 1929

This cause comes on to be heard on the motions of J. B. Knudsen and Letus N. Crowell to dismiss the bill of complaint; the same being argued by counsel and submitted in open court by counsel of record, and being considered by the court,

It is ordered, adjudged, and decreed by the court that the said motions of J. B. Knudsen and Letus N. Crowell to dismiss the bill of complaint be and the same are taken under submission.

Done this the 18th day of March, A. D. 1929.

ROBERT T. ERVIN,
Judge.

In United States District Court.

[Title omitted.]

Motion for leave to amend complaint

Filed Mar. 20, 1929

Now comes the complaint in the above entitled cause, and moves the court for leave to amend his complaint in said cause, by adding thereto, after the sixth paragraph, and immediately before the prayer for process, the following paragraphs, namely:

Seventh. And the complainant further shows unto the court that the award of said deputy commissioner was not according to law in this, that the act of Congress, under and pursuant to which said deputy commissioner acted, or purported to act, namely, the longshoremen's and harbor workers' compensation act, 44 Stat., 1424, is unconstitutional and void for that it violates the fifth amendment to the Constitution of the United States in so far as it provides that no person shall be deprived of life, liberty or property, without due process of law.

Eighth. Complainant further shows unto the court that said award was contrary to law in that the act of Congress, under which the respondent, Letus N. Crowell, purported to act, viz, the longshoremen's and harbor workers' compensation act, 44 Stat., 1424, is unconstitutional and void in that it violates the seventh amendment to the Constitution of the United States by depriving the complainant of the right of trial by jury in a common law case, where the value in controversy exceeds twenty dollars.

Ninth. Complainant further shows unto the court that said award was contrary to law in that the act of Congress, viz, the longshoremen's and harbor workers' compensation act, 44 Stat., 1424, under which the respondent, Letus N. Crowell, purported to act, is unconstitutional and void because it violates the provisions of the fourth amendment to the Constitution of the United States, providing that the right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated.

Tenth. Complainant further shows unto the court that said award was contrary to law in that the act of Congress, under which the respondent, Letus N. Crowell, purported to act, viz, the longshoremen's and harbor workers' compensation act, 44 Stat., 1424, is unconstitutional and void in that it violates the fifth amendment to the Constitution of the United States in so far as it provides that no person shall be deprived of life, liberty or property, without due process of law.

the respondent, Letus N. Crowell, purported to act, viz, the longshoremen's and harbor workers' compensation act, 44 Stat., 1424, is unconstitutional and void in that it violates section two of article three of the Constitution of the United States, which provides that the judicial power of the United States shall extend to all cases of admiralty and maritime jurisdiction.

Twelfth. Complainant further shows unto the court that said award was contrary to law in that the act of Congress, under which the respondent, Letus N. Crowell, purported to act, viz, the longshoremen's and harbor workers' compensation act, 44 Stat., 1424, is unconstitutional and void in that it violates section two of article three of the Constitution of the United States, in that it seeks to vest in an administrative officer, judicial functions, vested by said article of the Constitution in such inferior courts as the Congress may from time to time ordain and establish.

OUTLAW, KILBORN & SMITH,
HARRY T. SMITH & CAFFEY,
Solicitors for Complainant.

[File endorsement omitted.]

33 In United States District Court for the Southern Division of the Southern District of Alabama

CHARLES BENSON, COMPLAINANT

vs.

LETUS N. CROWELL, DEPUTY COMMISSIONER, ET AL., RESPONDENT

No. 135

Outlaw, Kilborn & Smith, of Mobile, Ala., and
Harry T. Smith & Caffey, of Mobile, Ala., for complainant.
Pillans, Cowley & Graham, of Mobile, Ala., for Knudsen.
Alex G. Birch, United States attorney, for Crowell.

Opinion of Hon. Robert T. Ervin, Judge, on motion to dismiss.

Filed May 27, 1929

This is a proceeding filed by Benson against Crowell as deputy commissioner for the 7th compensation district appointed and acting under and by virtue of act of Congress known as the longshoreman's and harbor workers' compensation act, and against J. B. Knudsen, who claims to have suffered an injury while working for Benson. The deputy commissioner allowed Knudsen's claim and the [illegible] by Benson under subdivision b, of section 21 of [illegible] found in United States Statutes at Large, vol. 44, page 1424. The proceeding as amended attacks the act [illegible] provisions of the Constitution, and charges that

the proceedings had before the deputy commissioner were not
34 in accordance with law. The act has never yet been construed by the Supreme Court but it has been before several of the district courts.

In Obrecht-Lynch Corp. vs. Clarke, 40 Fed. (2nd) 144, Judge Coleman held the act to be constitutional and also held that the provision under subdivision b, section 21, should be confined to a review of the testimony presented to and considered by the deputy commissioner.

Judge Hutcheson in Howard vs. Monahan, 30 Fed. (2nd) 480, also held that the appeal under subdivision b, to the district court is limited to enjoining or affirming the award of the commissioner, with the further right if enjoined to direct the commissioner to proceed to make a new award in accordance with law.

Judge Peters on April 2nd in the case of Patrick J. Joyce vs. United States Deputy Commissioner in the first compensation district (not yet reported) held that it was plain the courts are not authorized to interfere unless the award is clearly not in accordance with law. He says, "There is no appeal from the findings of the deputy commissioner. His award is final. It is only when it is shown he has not proceeded according to law that the court has any jurisdiction."

The only one of these three opinions which purports directly to discuss the question of constitutionality is that of Judge Coleman, but the question as raised before me brings the matter in a different light from that considered by him.

The compensation act provides for the filing of a petition with the deputy commissioner, a hearing by him, and an order to be made by him on the hearing. It is then provided by section 18 of the act that if the employer delays over thirty days before complying with the award of the deputy commissioner he may investigate the matter and make a supplementary order declaring the amount of the default which shall be filed in the same manner as the compensation order. A certified copy of such supplementary order may be filed with the clerk of the Federal district court.

35 "Such supplementary order of the deputy commissioner shall be final, and the courts shall upon the filing of the copy, enter judgment for the amount declared in default by the supplementary order if such supplementary order is in accordance with law. Review of the judgment so entered may be had as in civil suits for damages at common law. Final proceedings to execute the judgment may be had by writ of execution in the form used by the court in suits at common law in actions of assumpsit."

In section 21, subdivision b, it is said,

"If not in accordance with law, a compensation order may be suspended or set aside, in whole or in part, through injunction proceedings mandatory or otherwise, brought by any party in interest against the deputy commissioner making the order, and instituted

in the Federal district court for the judicial district in which the injury occurred."

In the proceedings to enjoin the deputy commissioner a number of constitutional objections are raised, but they narrow down to two.

First, section 2, article 3, which reads "the judicial power shall extend * * * to all cases of admiralty and maritime jurisdiction."

Second, the 5th amendment to the Constitution which provides that no person shall be "deprived of life, liberty, or property without due process of law."

It is urged upon me in the first instance that the hearing before the commissioner is not a judicial hearing by an admiralty court but a mere fact finding statutory proceeding had before an administrative officer under the provisions of this compensation act, and therefore that there was no exercise of the judicial power vested by the Constitution in the Supreme Court and such inferior courts as the Congress may from time to time ordain and establish.

36 In Old Colony Trust Co. et al. vs. Comr. of Internal Revenues 279 U. S. 716, June 3, 1929, the Supreme Court in discussing a similar administrative function of the Government says,

"The Board of Tax Appeals is not a court. It is an executive or administrative board, upon the decision of which the parties are given an opportunity to base a petition for review to the courts after the administrative inquiry of the board has been had and decided."

In Farrel vs. Waterman, 291 Fed. 604, I discussed this question and expressed my view that such inferior courts as Congress from time to time established were invested with power directly by the constitutional provision just as positively as was the Supreme Court; though Congress could apportion this power among such inferior courts as it chose to ordain and establish. The investment of judicial power however, came from the Constitution and not from the act of Congress creating the court. I see no cause to change the view then expressed but am more convinced of it now than at the time I wrote the opinion. London Guarantee Accident Co., Ltd. vs. Industrial Accident Com. of California, 279 U. S. 109, Apr. 8, 1929; Ex parte Bakelite Corp., 279 U. S. 438, May 20, 1929.

I think every one will concede that the proceeding before the deputy commissioner was not a judicial proceeding, but was a mere statutory proceeding by an administrative officer directed and controlled by the Government's agent.

In Murray's Lessee et al., vs. Hoboken Land & Improvement Co., 18 Howard, 272, the court says in speaking of the statutory proceedings provided by Congress for auditing the accounts of receivers of public moneys, and filing the reports of the audit with the court:

"That the auditing of the accounts of a receiver of public moneys is not, in its ordinary sense, a judicial act, must be conceded. So are all those administrative duties that require the consideration of facts, which involves an inquiry into the existence of facts, and the application to them of rules of law. In this sense the [illegible]

of the President in calling out the militia under the act of 1795, 12 Wheat. 19. or of a commissioner who makes a certificate for the extradition of a criminal, under a treaty, is judicial. But it is not sufficient to bring such matters under the judicial power, that they involve the exercise of judgment upon law and fact. United States vs. Ferreira, 13 Howard, 40. It is necessary to go further, and show not only that the adjustment of the balances due from accounting officers may be, but from their nature must be, controversies to which the United States is a party, within the meaning of the second section of the third article of the Constitution. We do not doubt the power of Congress to provide by law that such a question shall form the subject matter of a suit in which the judicial power can be exerted. The act of 1820 makes such a provision for reviewing the decision of the accounting officers of the treasury. But, until reviewed, it is final and binding; and the question is, whether its subject matter is necessarily, and without regard to the consent of Congress, a judicial controversey. And wer are of the opinion it is not."

On page 275 of the opinion in the same case it is said,

"It must be admitted that, if the auditing of this account, and the ascertainment of its balance, and the issuing of this process, was an exercise of the judicial power of the United States, the proceeding was void; for the officers who performed these acts could exercise no part of that judicial power. They neither constituted a court of the United States, nor were they, or either or them so connected with any such court as to perform even any of the ministerial duties which arise out of judicial proceeding."

The question therefore arises whether or not the act under discussion undertakes to deprive the Federal courts of judicial power conferred upon them by the Constitution.

The answer to this question depends somewhat as it did in the Murray case upon the conclusions reached as to the due process clause, and I shall therefore now discuss that.

In the same case of Murray's Lessee on page 276 the court says,

"That the warrant now in question is legal process, is not denied. It was issued in conformity with an act of Congress. But is it 'due process of law'? The Constitution contains no description of those processes which it was intended to allow or forbid. It does not even declare that principles are to be applied to ascertain whether it be due process. It is manifest that it was not left to the legislative power to enact any process which might be devised. The article is a restraint on the legislative as well as on the executive and judicial powers of the government, and cannot be so construed as to leave Congress free to make any process 'due process of law,' by its mere will. To what principles, then are we to resort to ascertain whether this process, enacted by Congress, is due process? To this the answer must be two fold. We must examine the Constitution itself, to see whether this process be in conflict with any of its provi-

sions. If not found to be so, we must look to those settled usages and modes of proceeding existing in the common and statute law of England before the emigration of our ancestors, and which are shown not to have been unsuited to their civil and political condition by having been acted on by them after the settlement of this country."

"For, though 'due process of law' generally implies and includes actor, reus, judex, regular allegations, opportunity to answer, and a trial according to some settled course of judicial proceedings (2 Inst. 47, 50; Hoke vs. Henderson, 4 Dev. N. C. Rep. 15; Taylor vs. Porter, 4 Hill, 146; Van Zandt vs. Waddel, 2 Yerger, 260; State Bank vs. Cooper, Ibid, 599; Jones's Heirs vs. Perry, 10 Ibid, 59; Greene vs. Briggs, 1 Curtis, 311), yet, this is not universally true. There may be, and we have seen that there are cases, under the laws of England after Magna Carta, and as it was brought to this country and acted on here, in which process, in its nature final, issues against the body, lands, and goods of certain public debtors without any such trial; and this brings us to the question, whether those provisions of the Constitution which relate to the judicial power are incompatible with these proceedings."

The court then proceeded to show that against public debtors there were summary proceedings recognized in Great Britain and in this country which made the proceedings in that case "due process of law."

In the instant case where the employee is seeking to hold the employer liable for an injury suffered by the employee in the performance of his duty, there certainly never was any summary or ministerial proceedings recognized either by the common law in England, or by the practice in this country, which permitted a liability to be fastened upon the employer, and his property to be subjected to this demand, until after a judicial trial of the rights and questions involved.

The court says in the same Murray case on page 284,

"To avoid misconstruction upon so grave a subject, we think it proper to state that we do not consider Congress can either withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty; nor, on the other hand, can it bring under the judicial power a matter which, from its nature, is not a subject for judicial determination."

I think no one would be so hardy as to contend that the proceedings provided for in this compensation act was a judicial determination of the rights of an employee as against the employer, and unless there is to be found in the act either by appeal, injunction, or otherwise, the right of the parties to have the liability determined by judicial process and hearing then the act is unconstitutional.

It was urged upon me as undoubtedly it was upon the other judges who had this act before them, that the court is limited by the law in its hearing on the injunction, to the question whether or not there was any evidence offered before the deputy commissioner

in which he could have found liability, and that the court under the terms of the act can not have a hearing de novo and pass upon the merits of the case, but is limited to the question whether or not the commissioner on the evidence before him could have found liability.

If this be true then it seems to me necessarily the act was beyond the power of Congress and is void.

In Ohio Valley Co. vs. Ben Avon Borough, 253 U. S. 288, a case in which under a Pennsylvania statute a valuation of a water works concern by a public service commission of Pennsylvania was made for the purpose of determining a fair rate to be charged by the water company, Mr. Justice McReynalds writing for the court on page 289 says,

"Looking at the entire opinion we are compelled to conclude that the Supreme Court interpreted the statute as withholding from the courts power to determine the question of confiscation according to their own independent judgment when the action of the commission comes to be considered on appeal.

"The order here involved prescribed a complete schedule of maximum future rates and was legislative in character. Prentis vs. Atlantic Coast Line Co., 211 U. S. 210; Lake Erie & Western R. R. Co. vs. State Public Utilities Commission, 249 U. S. 422, 424. In all such cases, if the owner claims confiscation of his property will result, the State must provide a fair opportunity for submitting that issue to a judicial tribunal for determination upon its own independent judgment as to both law and facts; otherwise the order is void because in conflict with the due process clause, fourteenth amendment.

The fourteenth amendment applies to the States while the fifth applies to the Federal Government.

I can see no distinction between valuing the property of a water works plant for rate-making purposes, by a commission, and the determination by a deputy commissioner that an employer is liable to an employee for a given sum because of an injury suffered while in the employment. In the one case the water works plant is denied a proper return upon its investment, so its property is taken without due process of law, while in the other the property of the employer is subjected to execution and sale to pay the award made by the deputy commissioner, and so his property is taken without due process of law. In fact the latter is the more direct loss, for while one is denied the right to make a profit, the other is deprived of property already earned.

Certainly proceedings by a commissioner under this act is not more due process than was the hearing by the public service commission in fixing the rates. In neither instance was there a judicial hearing and determination of the rights of the respective parties. If anything there is less due process as against an employer of labor because it is common knowledge that it was in no sense carrying on a public function but was conducting private business.

Can the provisions of the act in question be treated in any way as giving to the admiralty courts the power to hear and determine the facts as well as the law? In section 18 of the compensation act it is provided that in case of default by the employer of the payment of the award within thirty days the deputy commissioner may have an investigation and determine the amount of the default and that this determination may be filed in the Federal district court and it then said "such supplementary order of the deputy commissioner shall be final, and the court shall upon the filing of a copy enter judgment for the amount declared in default by the supplementary order if such supplementary order is in accordance with law. *Review of the judgment so entered may be had as in civil suits for damages at common law.*" Italics mine.

Now, what judgment was it that might be reviewed as in civil suits for damages at common law? Was it the judgment of the deputy commissioner or was it the judgment of the district court? Apparently it was the judgment of the district court for the provision was that such supplementary order of the deputy commissioner shall be final and the court shall enter judgment for the amount declared in default. The only judgment referred to apparently was the judgment of the court. If the judgment of the court however was to be reviewed, what error could be found by any other court if the court was required by the act to enter judgment in the amount found by the deputy commissioner?

Did Congress intend to require the court to enter its order merely on the finding of the deputy commissioner, and to make that order final. Was the court to make its order without any hearing of the facts, to submit its judgment to the domination of the deputy commissioner because the act said do it? If so would not this of itself
48 be an unconstitutional requirement. How can the Congress require to enter a judgment as between private citizens without a hearing of the facts by the court.

However, we find that the court was to enter judgment for the amount declared in default by the supplementary order. "If such supplementary order is in accordance with law," so apparently by the very terms of the act the court was required to investigate the findings of the deputy commissioner to see if they were in accordance with law. It therefore appears likely that it was the judgment of the deputy commissioner which was to be reviewed.

Subdivision b, of section 21 says, "If not in accordance with law, a compensation order may be suspended or set aside in whole or in part, through injunction proceedings."

That is the same term used in section 18, namely, "If not in accordance with law." What did the Congress mean by these words? Surely they did not mean to limit the court in considering the order of the commissioner to the determination that there was no evidence considered by him which would authorize a decree. If on the hearing before the commissioner the evidence did not justify a compensation order by him then his order would not be in accordance with law.

Again, if the evidence offered before the court on the application for an injunction, on the hearing on such application showed that the award should not be made, then surely the award would not be in accordance with law because to be in accordance with law the facts of the case should justify the award. Again, it is said the "order may be suspended or set aside, in whole or in part." Now if the court is to set it aside in whole or in part does that not indicate an intention that the court was to have all the facts before it, for if the court was not confined in its determination to the question whether the award as a whole was in accordance with law, it must be that Congress intended the court to do complete justice, and to do this the court must have all the facts before it. Again, it will be noticed that there is no provision or requirement for remanding the case to the deputy commissioner. If the court is to set it aside in whole or in part the court is to write the final judgment, and if so it should be only after hearing all the facts.

I can not conceive that Congress ever meant to deprive the employer of labor of the right to a fair judicial hearing before providing that his property might be subjected to the payment of any demands, and therefore I am inclined to treat these provisions found in the act as authorizing the court to go into the real facts and grant a hearing de novo, for it is only by so construing the act that I can hold it to be constitutional.

I feel it my duty to stretch all uncertain expressions used by Congress as far as possible in order to hold the act constitutional just as the Supreme Court did in Hop Fong vs. United States, 209 U. S. 453. Certainly the congress intended there should be an appeal from the ruling by the deputy commissioner to the Federal district court and it is only by treating such appeal as one granting to the court the right to consider the question of fact as well as of law that the act is to be held constitutional. So construed the act conforms to both the constitutional provisions discussed, while the other construction would violate both.

As a question of practice the provisions of subdivision b, section 18, would ordinarily be treated as being on the equity side because the trial or hearing by the court is had through injunctive process, not remembering that the injuries provided for by the act are had in maritime cases and the act only states that it should be entered "in the Federal district court for the judicial district in which the injury occurred."

I hold that the proper court for an injunction to be brought is the admiralty side of this court.

The motion to dismiss the proceedings will therefore be overruled and the court will grant a hearing on the facts and the law to ascertain if the proceedings before the deputy commissioner were in accordance with law.

ROBERT T. ERVIN,
Judge.

Done this 27th day of May, 1929.

[File endorsement omitted.]

In United States District Court

[Title omitted]

Order overruling motion to dismiss

Filed May 27, 1929

This cause having been heard on the 18th day of March, 1929, on the motion filed by Letus N. Crowell and J. B. Knudsen to dismiss the bill of complaint, and said motion being on that day taken under submission by the court;

The court now renders his opinion that the motion to dismiss should be overruled.

It is, therefore, ordered, adjudged, and decreed by the court that the said motion to dismiss be, and the same is, overruled, to which ruling the respondents each except.

Made this 27th day of May, A. D. 1929.

ROBERT T. ERVIN,
Judge.

46 Copies mailed to Outlaw & Kilborn, Harry T. Smith & Caffey; Pillans, Cowley & Gresham; United States attorney.

[File endorsement omitted.]

In United States District Court

[Title omitted.]

Order transferring cause to admiralty docket

Filed May 30, 1929

It appearing to the court that this petition for a writ of injunction was brought on the equity side of this court; and that said cause comes under the admiralty jurisdiction;

It is, therefore, ordered, adjudged, and decreed by the court that the clerk do transfer this cause to the admiralty side and let all further proceedings be had in admiralty.

Made this the 30th day of May, A. D. 1929.

ROBERT T. ERVIN,
U. S. District Judge.

47 [File endorsement omitted.]

In United States District Court

CHARLES BENSON, COMPLAINANT

vs.

LETUS N. CROWELL, DEPUTY COMMISSIONER, ET AL., RESPONDENTS

In Admiralty, No. 2176

Answer of Knudsen to bill of complaint

Filed June 24, 1929

To the honorable ROBERT T. ERVIN, *Judge of the United States District Court for the Southern District of Alabama, in Equity:*

The respondent J. B. Knudson, for answer to the bill of complaint, says:

1. The allegations of paragraph 1 of the complaint are admitted, save as to the manner in which complainant does business, strict proof of which is demanded, if deemed material.

2. The allegations of paragraph 2 are admitted.

3. The allegations of paragraph 3 are admitted.

4. The allegations of paragraph 4 are denied, separately and severally, except that this respondent admits that the cable had been previously cut by him.

5. Respondent alleges that he sustained the injuries referred to in the third paragraph of the bill of complaint while employed by complainant; that said injury arose out of and in the course of his employment by complainant, which said injury occurred upon the navigable waters of the United States; that said complainant was then and there an employer having one or more employees employed in maritime employment, in whole or in part, on the navigable waters of the United States.

6. Respondent admits filing a suit at law in the Circuit Court of Mobile County against complainant; but respondent denies that he elected not to maintain his claim for compensation under the longshoremen's and harbor workers' compensation act, and alleges that he was and is entitled to maintain said claim under said act; and that he was and is entitled to compensation under said act, as provided by the terms of the award marked "Exhibit C" and attached to the bill of complaint.

Wherefore, the premises considered, respondent prays that the bill of complaint may be dismissed, with respondent's costs and charges in this behalf incurred; but, if respondent be mistaken in

the relief prayed, respondent prays for such other, further or different or more general order, decree or relief, as in law and equity this respondent may be entitled.

PILLANS, COWLEY & GRESHAM,
Solicitors for Respondent, J. B. Knudsen.

[File endorsement omitted.]

49 In United States District Court

[Title omitted.]

Adoption of answer of Knudsen by deputy commissioner

Filed July 3, 1929

Now comes Letus N. Crowell, deputy commissioner, United States Employees Compensation Commission for the seventh compensation district, one of the respondents in the above described cause, by the United States attorney for the Southern District of Alabama, after motion to strike the demurrer was overruled, and adopts as his answer to the original bill of complaint in this cause the answer filed by J. B. Knudsen, the other respondent.

ALEX C. BIRCH,
United States Attorney.

(For Letus N. Crowell, deputy commissioner, United States Employees Compensation Commission for the seventh compensation district.)

[File endorsement omitted.]

50 In the United States District Court for the Southern Division of the Southern District of Alabama

CHARLES [illegible]NSON

vs.

LETUS N. CROWELL

No. 2176, In Admiralty

Filed Oct. 19, 1929

Transcript of the oral evidence and proceedings had in the above entitled cause on the 3rd day of July, 1929, before the Hon. Robert T. Ervin, judge.

Appearances: Messrs. Pillans, Cowley and Gresham, Mr. A. T. Gresham, Hon. Alex Birch, and Hon. J. E. Meredith, attorneys for the defendant. Messrs. Outlaw & Kilborn, Mr. V. F. Kilborn, attorneys for the complainant.

Dr. W. S. Dean, a witness called on behalf of the defendant, after having been first duly sworn, testified as follows:

Direct examination by Mr. Graham:

Q. You are surgeon in charge of the United States marine hospital at Mobile?

Ans. I am.

Q. You have had and have, in the marine hospital, J. B. Knudsen, the respondent in this case?

51 Ans. Yes, sir.

Q. And he has been at the marine hospital continuously since July the 4th, 1927, until this date?

Ans. Yes, sir.

Q. Suffering from an injury of the leg?

Ans. Yes, sir.

Q. State to the court the nature of the injury—what treatments or operations have been performed, and his present condition.

Ans. Knudsen has been a patient in the hospital for two years. I have only been in Mobile since August 20th, 1928. Knudsen was admitted to the hospital, according to his record, for a fracture intercondyloid of the right femur. For this fracture he has been operated upon more than once. The exact number of times, I do not know. He has a resulting limitation of motion in the right leg, for which, in our opinion, treatment will be of no avail. Meaning that the function of the leg will not be improved materially. He received, from time to time various treatment in physiotherapy with the hope of improving the motion slightly.

Q. Is there any difference in the length of the injured limb and the other limb, Doctor?

Ans. I do not know.

Q. Dr. Hanan has been the specialist in charge of the case?

Ans. Yes, sir.

Q. Are you able to tell us the extent of Mr. Knudsen's permanent disability from this injury?

Ans. From the record and the report that we have made on Knudsen, my recollection is that his disability has been rated as sixty per cent permanent.

Q. The injury that he received and the necessary treatment which he underwent, would that be likely to cause pain and suffering?

Ans. The original injury and first treatment in similar cases would be the cause of considerable pain and discomfort.

52 Crossexamination by Mr. Kilborn:

Q. Dr., did you bring with you that certificate under which he was admitted to the marine hospital?

Ans. I did; yes, sir.

(Note.—The witness produced a paper.)

Q. Is this the original certificate, under authority of which this man, Joe Knudsen, was admitted to the marine hospital in Mobile?

Ans. That is the one that is in the record as the original. I have no direct knowledge that it is the original.

Q. Signed by Beauregard Roberts?

Ans. Yes, sir.

Q. Under the rules and regulations of the marine hospital, it is necessary, in order that a man may gain admission to the hospital, that this certificate be made by the master of the vessel on which he is supposed to be employed, is it?

Ans. In the case of seaman, he must present satisfactory evidence that he is employed on board a registered or licensed vessel of the United States; a certificate signed by the master or a responsible officer of the vessel is sufficient evidence, or his discharge executed by the United States shipping commissioner.

Q. In this case here you took the certificate here as the master's certificate?

Ans. Yes, sir.

The COURT. If you wished, you could substitute a copy for that and withdraw the original.

Mr. KILBORN. I will read it into the record.

(Mr. Kilborn thereupon read the following:)

53 "July 4th, master's certificate of service or sick or injured seamen. Addressed to the medical officer in charge United States Public Health Service. I certify, on honor, that J. B. Nutsen,"—and above that is written the proper spelling of the name, Knudsen, "whose signature and description appear below, has been employed on board in the care, preservation, or navigation—or in the service on board of this—was employed on the Tug 'Sister' of Mobile, official registry No.——, a vessel whose personnel is entitled to medical treatment by the United States Public Health Service. His period of service on the above-named vessel was from the first day of December 1925 to date. I further certify that the person named herein has, in my presence, signed his name in the blank space provided below for that purpose," and this is signed Beauregard Roberts, master of the above-named vessel, and below that this appears, "Signature of the person named above," and there appears a signature but it is scratched out. "Nativity, Norwegian. Age, 55 years. Height, 5 feet 10 inches, color of eyes (in my employ)—color of hair, blue. Distinguishing marks, none. Previous service——. Total service on United States vessels, 10 years."

Mr. KILBORN. We offer that in evidence.

Mr. GRESHAM. Captain Beauregard Roberts, the person signing that paper, is in court, and I expect to examine him as a witness, and if it is possible, I would like to retain that until we examine Captain Roberts.

Cross-examination resumed by Mr. KILBORN:

Q. Your statement where you estimated the disability at 60 per cent—you meant 60 per cent of the loss of the use of that right leg?

Ans. Yes, sir; 60 per cent of that right leg.

Q. He walks all around?

Ans. Yes, sir. He is ambulant and goes on passes from the hospital. He can go twice a week if he wants to, as we do with all our patients who are ambulant.

Q. So far as you know he walks wherever he wants to with that stick when he goes out?

Ans. Yes, sir.

Redirect examination by Mr. GRESHAM:

Q. Assuming that Mr. Knudsen was a rigger, by trade, at the time of his injury, do you think it possible for him to continue that trade in his present condition?

Ans. No; he is completely disabled as a rigger.

Mr. KILBORN. You don't know what a rigger is, do you?

Ans. He has to climb aloft and go up scaffolds and ropes, which he can not do.

Q. He can get around on deck all right, though?

Ans. He can get around on level places, but he can not go up and down steps without difficulty. Walking on a level surface, he can walk fairly well.

Mr. GRESHAM:

Q. Do you know who admitted Captain Knudsen?

Ans. No; I don't know. It is usually recorded on the master's certificate, the Doctor's initials, but it is not recorded on this one. I don't know who admitted him.

Dr. W. C. HANNAN, a witness called on behalf of the defendant, after having been first duly sworn, testified as follows:

Direct examination by Mr. GRESHAM:

Q. Your initials are what?

Ans. W. C. Hannan.

Q. A practicing physician and surgeon in Mobile, Alabama?

Ans. Yes, sir.

Q. What has been your training or experience?

Ans. I am a graduate of the University of Alabama and post-graduate at New York for three or four years.

Q. At what institution?

Ans. Belleview Hospital.

Q. Are you connected, in any capacity, with the United States marine hospital?

Ans. Yes, sir; consulting orthopedic surgeon.

Q. And you have been for the last two years?

Ans. Last three and a half or four years.

Q. Have you examined and treated J. B. Knudsen, the respondent in this case?

Ans. Yes, sir.

Q. I believe you are referred to as specialist in bone trouble?

Ans. Bone conditions; yes, sir.

Q. Tell us Mr. Knudsen's injury, his treatment and his present condition.

Ans. Mr. Knudsen has suffered with a fracture just above the right knee in the femur. He had a fracture which went transversely across and split upwards, known as a T fracture, with a great deal of displacement of the fragments. It required a traction known as skeleton traction to reduce it. We had to pass a steel pin through the bone and apply about a thirty-pound weight over a period of about four weeks, and after that he had a plaster cast and then, on account of a piece of bone obstructing motion to the knee, it was necessary to open the knee joint and remove this bone, in order that we may hope to get some function or motion in the knee. He underwent a series of about three operations from the time of admission in the hospital, July the 4th, 1927, up to the present day.

Q. He suffered a good deal of pain from that injury?

56 Ans. About what they generally suffer in that type of injury.

Q. That is a good deal of pain, compared with some other injuries?

Ans. More pain than usual, in fractures.

Q. Do you think he has a permanent injury?

Ans. Yes, sir.

Q. And how much permanent?

Ans. I have not examined Mr. Knudsen since May the 5th. At that time I estimated——

Mr. KILBORN. Was that this year?

Ans. Yes, sir.

The WITNESS (cont'd). At that time I estimated disability at approximately sixty-five per cent.

Examination (cont'd) by Mr. GRESHAM:

Q. Doctor, assuming that Mr. Knudsen was a rigger and a diver by trade at the time of his injury, do you think he will ever be able to follow either of those vocations again?

Ans. No, sir.

Q. I take it you have no knowledge of the circumstances under which Mr. Knudsen was admitted to the hospital—you did not admit him?

Ans. None, other than the fact that he had an injury to his right knee by a pile-driver, I believe, on the 4th of July, 1927.

There was no cross-examination of this witness, and the witness was thereupon excused.

Mr. GRESHAM. That is our medical testimony, if the court pleases.

Dr. S. H. STEPHENS, a witness called on behalf of the complainant, after having been first duly sworn, testified as follows:

57 Direct examination by Mr. KILBORN:

Q. Are you a practicing physician and surgeon in Mobile?

Ans. Yes, sir.

Q. How long have you been practicing?

Ans. In the city?

Q. Altogether, your profession?

Ans. Six years.

Q. Did you go to the marine hospital on yesterday or to-day and make an examination of Mr. Knudsen, here?

Ans. I did yesterday afternoon or last night.

Q. Was anyone present with you when you made the examination?

Ans. Doctor Hatfield was with me—a member of the marine hospital staff.

Q. Dr. Hatfield?

Ans. Yes, sir.

Q. Did you examine the records of the marine hospital, with reference to treatment?

Ans. I did not.

Q. You made an examination of the man, himself?

Ans. Yes, sir.

Q. And the condition of his leg?

Ans. I looked at his leg; yes, sir.

Q. What is his present condition?

Ans. Well, the man has a partially ankylose knee. By that I mean he has a fixed knee. He has, I should say, about fifteen degrees motion. Twelve to fifteen degrees motion. His ankylose, with a slight flexion, is an angle of possibly a hundred and sixty-five (165) degrees.

Q. Has he got a permanent disability there?

Ans. He has.

Q. In your judgment, what percentage is that disability—the loss of the use of the leg?

Ans. The best I can figure, forty-five to fifty-five per cent—in that neighborhood.

58 Q. Do you know whether his condition will improve with use of his leg?

Ans. It will probably improve five per cent, maybe.

Q. With continued use?

Ans. Yes, sir.

Cross-examination by Mr. GRESHAM:

Q. Is the injured leg the same length as the other leg?

Ans. No, sir.

Q. What is the difference?

Ans. I didn't measure the difference. It is probably a half to three quarters of an inch.

Q. You say he has a motion of twelve to fifteen degrees in the knee?

Ans. Flexion—I mean he has a movement of twelve to fifteen degrees.

Q. Is that a perpendicular movement or a horizontal movement?

Ans. No; horizontal. It is anterior and posterior motion. Just a limb like this.

Q. What is the normal?

Ans. About ninety degrees.

Q. Assuming that Knudsen is a rigger, by trade—do you think that he could ever follow his trade again?

Ans. I do not. I do not think he could follow his trade.

The witness was thereupon excused.

Mr. KILBORN. That is all the medical testimony.

CHARLES BENSON, the complainant, called as a witness in his own behalf, after having been first duly sworn, testified as follows:

59 Direct examination by Mr. KILBORN:

Q. Are you Mr. Charles Benson?

Ans. Yes, sir.

Q. Are you proprietor of the Benson Sheet Iron and Metal Works?

Ans. Yes, sir.

Q. What business is that?

Ans. Sheet iron and copper works.

Q. Are you the only party interested in that business?

Ans. Yes, sir.

Q. Did you own a derrick barge called the "Chickasaw"?

Ans. Yes, sir.

Q. Did you own it on July the 4th, 1927?

Ans. Yes, sir.

Q. When did you acquire that barge?

Ans. February the 24th.

Q. 1927?

Ans. Yes, sir.

Q. On July the 4th, 1927, were you insured under the United States harbor workmen's compensation law?

Ans. The boat was out of commission and not working.

Q. Were you insured and did you have any insurance?

Ans. No, sir.

Q. At the time Mr. Joe Knudsen claimed to be injured, on July the 4th, 1927, was he in your employ?

Ans. No, sir.

Mr. GRESHAM. We object to the question because it calls for the opinion of the witness, and because it is a question for the court to decide.

The court overruled the objection and Mr. Gresham reserved exception to the ruling of the court.

60 Q. You say he was not?

Ans. No, sir; he was not.

Q. Had he ever been employed on the derrick barge "Chickasaw"?

Ans. Yes, sir.

Q. In what capacity?

Ans. Deck hand.

Q. Now, you bought that boat from the T. C. I. up at Chickasaw?
Ans. Yes, sir.
Q. And when you bought it, it was up at Chickasaw?
Ans. Yes, sir.
Q. What was it doing up there?
Ans. It was inside the sill. Chickasaw has an embankment all the way up around their property, and this boat was left inside that embankment, which was fifteen feet high, and we had to dig the boat out, and I sent Knudsen up there and they had the boat practically out of the fill. He went up there when they went to pull the piling out to let the boat out of the drainage canal.
Q. When was that when he was working on the boat up at Chickasaw?
Ans. I have a complete record there. You have it in the book. That was the early part of July—I mean the early part of May.
Q. Now, did Mr. Knudsen make any arrangements with you to borrow your derrick barge?
Ans. No, sir.
Q. Did he speak to you about borrowing it?
Ans. He spoke to me after Captain Roberts' barge sunk. It sunk in a north wind with a low tide.
Q. You say Captain Beauregard Roberts had a barge that was sunk?
Ans. Yes, sir; a derrick over at the Southern Dry Dock slip.
Q. On the other side of the river?
Ans. Yes, sir; and that boat sunk and it was in charge of Joe Knudsen.
61 Q. The Roberts barge was in charge of Joe Knudsen?
Ans. Yes, sir; he had borrowed that barge to help raise the "Apollo."
Q. Joe Knudsen had borrowed that barge from Captain Beauregard Roberts and it had sunk across the river in the Southern Dry Dock slip?
Ans. Yes, sir; he had their ways blocked in such a condition that they could not operate the roller ways.
Q. Knudsen spoke to you about borrowing your derrick?
Ans. Just as we got out of the fill, he said it had Captain Roberts worried and one thing or another.
Q. Then did you have any talk with Beauregard Roberts and Joe Knudsen about your loaning the barge?
Ans. Mr. Jim McArtle, examiner of the steel corporation—the T. C. I.—went up there.
Q. Getting away from Mr. McArtle, tell what happened in the conversation between you and Beauregard Roberts and Joe Knudsen about your loaning them your boat.
Ans. Mr. McArtle advised me to take the boat off the fill. I would have been there another week if I had left it on the fill, and Saturday night I went to the telephone and telephoned Captain Roberts and got him at the telephone, himself. I had an appointment with

some one at the Battle House at eight o'clock and it was then twenty minutes to eight, and I said, "Captain, have you time to come to the square a few minutes," and I said, "Is Joe Knudsen there." Captain Roberts and Joe Knudsen both lived in the same house. Joe Knudsen is a single man and Captain Roberts is a married man. He says, "Yes; Joe is right here," and I said, "Bring him down with you," and he says, "I will be there in five minutes," and I said, "Meet me in the south aisle," and we stopped at the third bench from Dauphin Street and I got there two minutes before they did, and I said, "Captain, Joe tells me you are worried about
62 that derrick," and he said, "I have the ways blocked and he says your derrick is the only thing in Mobile that will lift her, and I turned to Knudsen. I said, "Joe, if I let you have that derrick how long will it take you to get that boat out of the slip," and Captain Roberts said, "Captain, if you let me have that boat I will see that nothing happens to it and take good care of it and bring it back anywhere you want at Chickasaw." I was going to repair the boat in Chickasaw, in No. 1 slip, at the T. C. I. property, and I slapped him on the back and said, "Go get her." That was Saturday night, the 7th of May, and he took Knudsen and went up there with his own tug, Monday, and towed that boat to the Southern Dry Dock.

Q. Did you charge, or have any agreement to charge, either Knudsen or Beauregard Roberts for the boat?

Ans. That was all that was said. I had no idea of charging them.

Q. It was just an act of friendship?

Ans. Yes, sir.

Q. Then Beauregard Roberts and Joe Knudsen towed your derrick down from Chickasaw across the river to the Southern Dry Dock slip?

Ans. Captain Roberts' own boat, the "Sister."

Q. Had you purchased any big roll of cable for use on your derrick boat?

Ans. Yes, sir.

Q. How much?

Ans. Three thousand feet of it. I have the bill here from Paterson-McCoy.

Q. At what price?

Ans. $537.00.

Q. Did you have any conversation with Joe Knudsen about cutting any of that cable off that spool?

Ans. Yes, sir. When Knudsen went out there we had cut through the fill, but we had to pull about thirty piling to get into the creek and this boat had the original cable on it that they had
63 used in dredging at Chickasaw, and that not being sufficient to hold that boom when they went to pull this piling, I sent three thousand (3,000) feet of cable out there—enough to put the topping list on it, and also to reave that four-sheave block twenty feet below the water, and Joe Knudsen cut twelve hundred (1,200)

feet off that cable and ran a three and a half (3½) inch top through it and set it out on the piling.

Q. Cut 1,200 feet off for the topping list?

Ans. Yes, sir; and put the balance on the piling.

Q. Was there any more cable cut off there for a swing?

Ans. Yes, sir; eighty-five feet.

Q. Was anything said between you and Joe Knudsen as to whether he should cut any of the remainder of the cable left on the spool?

Ans. Yes, sir; I told him if he had any trouble with the wire breaking on the—

Q. That was the eighty-five feet you spoke of?

Ans. Well, it broke several times. I told him if he needed it for that to cut it off, but don't cut that cable—leave it like it is and all the cable put on the drum.

Q. You told him not to cut any more after cutting the topping list and the bull wheel above?

Ans. Yes, sir. She was rigged for dredging at that time. She wasn't rigged for listing. She was rigged for dredging.

Q. You told him when he got ready to rig it not to cut the wire?

Ans. Yes, sir. Enough wire to get a four-sheave block to go down twenty feet.

Q. That would be the rigging for the fall?

Ans. Yes, sir.

Q. Down from the topping list or swing or bull-wheel proposition?

Ans. Yes, sir.

Q. The boat was towed to the Southern Dry Dock?

Ans. Yes, sir.

64 Q. What was done over there?

Ans. Joe worked over there on that boat of Captain Roberts' and they got back there on the 9th. That was Monday—and Tuesday Harrison Brothers got the boat to get that wreck that burned that night and Harrison came to me and met me in a restaurant and said, "I see you have your derrick down there," and I said, "Yes; Captain Roberts has it up there raising the old 'Apollo,' and he says, could we get it, and I said, "I guess you could," and next evening he came down and wanted to know what I would charge him for it, and I said $75.00, and I said, "If you want it—see Joe," and they saw Joe and took it and lifted that and towed it back the same day.

Q. Before they did that Harrison job, had Joe Knudsen rigged it up?

Ans. Yes, sir. That was the first thing he had to do, because the boat wasn't in condition to lift anything when he brought it down.

Q. He brought it down primarily to do his own work of lifting for Captain Beauregard Roberts?

Mr. GRESHAM. We object to the question as leading.

The court sustained objection.

Q. At the time the boat was at Chickasaw, did you have any business for it at all?

Ans. No, sir.

Q. Did you have any Harrison job or any other job?
Ans. No, sir.
Q. What was the purpose of bringing the boat from Chickasaw?
Ans. Solely to help Captain Roberts to get that boat up, and then he was to tow her back, and we were to go under repairs and then when I came out of Chickasaw to put that fill back and lay the railroad track on it, which we tore up.
Q. You let her come down solely for Knudsen's purpose?
65 Ans. Yes, sir.
Q. But after she got down you got this Harrison job?
Ans. Yes sir.
Q. Did they do any other job?
Ans. Yes, sir. Captain Baker's barge sunk in the middle of Mobile River, south of Three Mile Creek and Herndon Radcliff's tug came up there and they pulled a plank off and sunk the boat in the middle of the river, and Captain Baker took charge of my boat and went to raise her. He went up with his own boat, the "Nugent" and towed her up there and raised her and brought her down and put her on Frank Henderson's Dry Dock. The next morning Dick Walsh came and got the boat and went to the L. & N. and loaded some rails for the T. C. I. This dredge was rigged for quick work for dredging and when you pull your lever to lift the bucket, it started the swing and when he went to lift the rails and Dick saw that condition, he took the boat right back to Henderson's Slip, because it was too dangerous. Then, Knudsen came over and wanted to take the boat back up and I started not to let him have it.
Q. Back up to the Southern Dry Dock?
Ans. Yes, sir.
Q. To finish work on Captain Roberts?
Ans. Yes sir.
Q. Did you let him have it?
Ans. I did.
Q. Did he finish.
Ans. Not that day. He went up to Mat Lipscomb and Captain Roberts, had Mat Lipscomb tow the boat to the Southern Dry Dock.
Q. He finally finished raising Captain Roberts' boat with your boat?
Ans. Yes sir. He had my boat twelve days and they were at the dock eleven days, and I used the boat three days.
Q. That is a record of the time?
Ans. Yes, sir; kept by bookkeeper from the time I bought her.
66 Q. Of her movements?
Ans. Yes, sir; I bought the boat February 24th—moved to Harrison's May 8th, loaned it to Roberts on the 7th—next day was the 8th, which I charged against him, and the 9th, 10th and the 11th.
Q. You said something about charging him—did you ever make any charge against him for using the boat?
Ans. I never did. I never intended to.

Q. You mean it was entered on the book as showing that it was being used by him?

Ans. Yes, sir.

Q. After Knudsen finished raising the Roberts' derrick boat over there in the Southern Dry Dock Slip, what was done with your derrick barge?

Ans. After they had gotten there that evening, this man, Mead, of the Southern Dry Dock, superintendent of the Southern Dry Dock, telephoned me and asked me would I wait for him, and I told him I would.

Mr. GRESHAM. We object to any conversation.

Q. After Knudsen finally got through with his own work—that is, raising the Roberts boat—then, what became of your derrick boat?

Ans. The next morning I had to go to Dr. Frederick's office and didn't go to the shop until ten o'clock, and I told that man there, that day, that under no circumstances to move my boat, "when you get rid of this thing." I had made up my mind then to let Jim Campbell calk the boat there, at the Southern, and I got down and saw Smith on the derrick and I went out there and asked Charlie what he was doing with the boat there.

Q. Where was that?

Ans. At the foot of Palmetto Street—and Herndon Radcliff rang and said he had those two big pontoons.

Q. I want the movements of the boat. She went and moved Herndon Radcliff's pontoons?

67 Ans. Yes, sir.

Q. Then, what did she do?

Ans. Laid there, and the next morning went to Frank Henderson's.

Q. What did she do there?

Ans. Started to raise a sunken barge of mine.

Q. Where did she go then?

Ans. To the Alabama Dry Dock—Gulf department.

Q. For repairs?

Ans. Yes, sir. Hauled out on the dock.

Q. During the time that she was doing the Henderson job and the Baker sand and gravel job and the Radcliff job and when she went over and tried to raise your barge, and when she was on the Alabama Dry Dock, was Knudsen working on her during all that time?

Ans. Yes, sir.

Q. As a member of the crew?

Mr. GRESHAM. We object to that.

The court overruled objection and Mr. Gresham reserved exception to the ruling of the court.

Q. How much were you paying him?

Ans. $5.00 a day—$30.00 a week.

Q. Who else was working on her besides Knudsen?

Ans. Charlie Smith.

Q. He is here to-day?

Ans. Yes, sir.

Q. He is the engineer?

Ans. He is the man that brought her out of Chickasaw.

Q. What sort of work was Knudsen doing?

Ans. Deck hand on the boat and rigger and fastener.

Q. When he went to lift anything, he would fasten the
68 wires?

Ans. Smith ran the engine.

Q. And he did the fastening?

Ans. Yes, sir.

Q. And did the general deck-hand work on the boat?

Ans. Yes, sir.

Q. When she was on the Alabama Dry Dock being repaired, was he chipping and painting and doing the work?

Ans. Not much of anything—no painting.

Q. He was pottering around on the boat?

Ans. Yes, sir; he was there.

Q. You were paying him $5.00 a day?

Ans. Yes, sir.

Q. From the Alabama, where did you go?

Ans. After they got through with her at the Gulf, she shifted across the river in the big slip and there was a big steamer to come in there and we shifted into Pinto Pass and the Gulf side of the Alabama Dry Dock.

Q. And tied up there?

Ans. Yes, sir; and the carpenters finished the work on her there.

Q. And Knudsen was still on her?

Ans. Yes, sir; and that is where I got rid of him, right there, June the 11th.

Q. June the 11th?

Ans. June the 11th, 1927, is the last day Joe Knudsen ever worked for me.

Q. You paid him off up to that time?

Ans. I did, and my checks will show it.

Q. He was hurt July the 4th; now did you discover, Mr. Benson, that your cable, this valuable cable that was left on the spool, instead of putting all that cable on the drum as you had instructed, did you discover that Knudsen, or someone in charge of that boat, had cut the cable?

Ans. I found that out in Henderson's. I saw some of it wound up on the spool and I asked Charlie Smith who cut the cable and he said, "There is the man right there."

69 Q. Pointing to Knudsen?

Ans. Yes sir, and Knudsen was out there, and I called Knudsen and asked him why he cut that cable and he started a harrangue about it being long enough, and I said, "I know it wasn't long enough."

Q. How did you want your fall?

Ans. I wanted it all put on the drum on the boat.

Q. For what?

Ans. In case of necessity. I would have a four sheave block to drop down in the ship, and the safe working load was eight tons. Four sheave blocks have nine parts. You would figure five times eight is forty. Forty tons would be a safe lift for her.

Q. How did Knudsen have her rigged?

Ans. Two sheaves.

Q. And you wanted her rigged, how?

Ans. I wanted enough wire on the drum so that I could rig a four sheave. That is what I bought the cable for.

Q. What was the effect of his having cut the cable when you rigged it three sheaves?

Ans. He rigged it two sheaves. And when we went to leave the "Alabama" and pick up that stuff on the wharf, when he shoved it through the three sheave and fastened it and pulled up with his wire, that stuff was sixty feet in the air, and hung there, and that is the reason he went to lowering the boom when he went to do his splicing.

Q. If he rigged it three sheaves, it was sixty feet in the air?

Ans. It wasn't long enough to rig it three sheaves, and when he let his wire out on the drum, all that wire stayed suspended.

Q. What did you say to Knudsen about having cut the cable and ruined it?

Ans. Just bawled him out about it. That is all I could do.

Q. What did he say to that?

Ans. He could not say nothing. He contended, at first, that
70 it was long enough, but after he shoved that in there he seen that it was not, and that is when I let him go, after that.

Q. Did you speak to Captain Roberts about what Knudsen had done?

Ans. Yes sir, when Mr. Bell wanted work done at the State Docks Mr. Bell asked me for a on the boat and then I rewired it and everything and rented the boat for the State Docks.

Q. He wanted your boat?

Ans. Yes sir.

Q. What did you say to Captain Roberts then, about the condition of the cable?

Ans. I got to thinking about the cable and telephoned Captain Roberts and asked him to come to my office and he came down.

Q. Who was present at your office?

Ans. My book-keeper, Albertine Lea and Mr. Harrison.

Q. What conversation did you have with Captain Roberts?

Ans. I said, "Captain, what are you going to do about my cable,—cutting my wire," and he said, "I can have that wire spliced for you and you could get service out of it," and Horace, the L & N rigger,—I had sent for him to get him to splice it and he would

not splice it and he said it was a dangerous proposition for a spliced wire on the derrick.

Q. Did you tell Captain Roberts about that?

Ans. Yes sir. And Harrison didn't want me to have the wire spliced. A party wanted to buy the boat and after I consented——

Q. After consenting to do what?

Ans. To have the wire spliced.

Q. In this conversation with Captain Roberts you consented for him to have it spliced?

Ans. Yes sir, to let him have it spliced. And Harrison contended I ought to let him buy a new wire for it, because I could have charged him for the barge.

Q. Who did Roberts say he was going to have splice it?

71 Ans. A Jamaica negro down there that makes mats.

Q. Did that negro splice it?

Ans. He did not. Captain Roberts came to my shop on the 2nd of July and he said he could not get that fellow to go over there, and said, "I am going to take Old Joe over there and make him splice it."

Q. Joe who?

Ans. Joe Knudsen.

Q. Then what happened?

Ans. The next day was Sunday and the Fourth of July was Monday—Floyd Lenis, who was an engineer on the tug, "Sister"——

Q. Who does the tug "Sister" belong to?

Ans. Captain Roberts.

Q. And Floyd Lenis was engineer?

Ans. Yes, sir. They came in my shop and Floyd Lenis had a pair of overalls under his arm, at eight o'clock in the morning of July the 4th, and I asked "where is Joe."

Mr. GRESHAM. We object to any conversation between this witness and Floyd Lenis.

Mr. KILBORN. It is our contention that it was Captain Roberts that was responsible for getting Knudsen on the boat.

The court sustained objection.

Q. Roberts and Lenis came into your shop?

Ans. Yes, sir.

Q. And left your shop?

Ans. To go over the river. That is where they picked up Jerry Woolsey.

Q. Who is he?

Ans. A man I hired two or three days before to look out for me.

Q. Woolsey was only employed?

Ans. Yes, sir.

Q. And Roberts and Lenis came by and picked up Walsh of your shop?

72 Ans. Yes, sir.

Q. And went where?

Ans. Across the river.

Q. What is the next thing you knew about Knudsen being hurt?

Ans. I asked where Knudsen was and they told me he went down Canal Street and had already gone over the river, and when they went over there Knudsen was already over there and had fire up in the boiler.

Q. The next thing you knew about Knudsen getting hurt was what?

Ans. Captain Roberts telephoned me that he had Joe on this side, hurt. "I think he has broke his knee," and asked me did I want to see him.

Q. Had you employed Knudsen to splice the cable?

Ans. No, sir.

Q. Or do anything on the day that he was hurt?

Ans. No, sir; I would not have had him under any circumstances.

Q. And the last time you employed him was June the 11th, 1927?

Ans. Yes, sir.

Q. You were not present when the man got hurt?

Ans. No, sir; Captain Roberts telephoned me and said he was hurt and asked me did I want to see him.

Q. You say this book that I have in my hand shows the movement of the boat correctly?

Ans. From the time I bought it until I sold it to the Alabama Iron Works.

Q. It was kept by your bookkeeper?

Ans. Yes, sir.

Cross-examination by Mr. GRESHAM:

Q. You testified in this case at the hearing before Mr. Crowell, here, did you?

Ans. Yes, sir; I did.

73 Q. I will ask you whether or not, in reference to the conversation had with Captain Roberts, after the accident, when he advised you of Knudsen's injury, if this is true: "Captain Roberts telephoned me at the shop and he says, 'Charlie, I had an accident over there'"?

Ans. He said Knudsen had the accident.

Q. "He says, 'Joe got his leg broke,' and I says, 'Captain, I am sorry he got hurt.'"

Ans. No; he asked me did I want to see Knudsen and I told him I wasn't interested in Knudsen at all, but I was very sorry he got hurt.

Q. Let me get through with the question and then you can answer whether it is so or not—"He says, 'will you come right down there,' and I says, 'I have no interest in Knudsen, I was not interested in him whether he broke his leg or not',"—is that right?

Ans. No, sir; that is not right.

Q. You didn't so testify?

Ans. No, sir. He didn't ask me to come down there. He told me he thought Joe had broken his knee and asked me did I want to see him. My testimony will show that I said I had no interest in Joe Knudsen, whatever, but I was very sorry he had broken his leg.

Q. You didn't testify to this: "I wasn't in him, whether he broke his leg, or not"?

Ans. No; I didn't say whether he broke his leg, or not.

Mr. KILBORN. I think he ought to read all of it.

Q. For what purpose did you purchase that derrick?

Ans. For doing general work.

Q. Where?

Ans. Around Mobile Harbor.

Q. What compensation was paid you for the Harrison job?

74 Ans. $75.00—one day's work.

Q. How much did you get for raising the Baker barge?

Ans. $150.00.

Q. How much did you get from Herndon Radcliff?

Ans. $25.00; and Henderson—I charged him nothing for raising his.

Q. When was the first time you saw that barge after she was brought down from Chickasaw?

Ans. That Saturday when I went over and paid Joe Knudsen and Charlie Smith and another man off. That was the first day I got Beardslee launch and went and paid them off.

Q. Where was she at that time?

Ans. In the Southern Dry Dock slip.

Q. Across the river?

Ans. Yes, sir.

Q. At that time the barge had already raised Harrison's barge?

Ans. Yes, sir.

Q. And Baker's barge?

Ans. No, sir—just Harrison's barge.

Q. Did you examine the fall at that time?

Ans. I just went there and paid them off and came back, and I wasn't there ten minutes.

Q. Who was present at the time you say you first discovered that the fall was improperly cut?

Ans. Charlie Smith and his little son were aboard the boat.

Q. Did you have any discussion with Mr. Knudsen in regard to splicing it, at all?

Ans. In regard to splicing it—do you mean previous to when he did splice it?

Q. Yes, sir.

Ans. Well, he was on the boat. I talked to him about the wire several times and he said he would splice it, but he never did.

Q. How many times was the subject of splicing that wire mentioned between you and Knudsen?

75 Ans. I don't suppose, over twice.

Q. Mr. Knudsen said that he would splice it?

Ans. When he was at the Gulf Dock, he asked me did I want it spliced then, but I had something else for him to do.

Question. What dry dock?

Ans. The Gulf dry dock.

Q. That was when the barge was under repairs?

Ans. Yes, sir; on the dock.

Q. And Knudsen asked you, at that time, if you wanted it spliced?

Ans. He remarked about it one day—about splicing it, but I did not want it spliced at that time, but several times after that I spoke to him about it, but it never amounted to anything. He never spliced it.

Q. What was your reply when he said that he would splice it?

Ans. I just told him to leave it alone. I had something else for him to do. I had six or eight carpenters working there and it wasn't an opportune time for him to splice it. I didn't need it.

Q. If the time had been opportune would it have been agreeable for him to splice it?

Ans. I didn't need it and it wasn't necessary for me to have it spliced on the dock. I could not leave anything while I was there.

Q. If it had been necessary and the time opportune, would it have been agreeable with you for Mr. Knudsen to splice it?

Ans. Yes, sir.

Q. And he offered to splice it?

Ans. Yes, sir.

Q. Do I understand that the Harrison barge was raised on May the 7th?

Ans. No, sir.

Q. Did you testify as to the date?

Ans. No, sir; I did not.

Q. Do you know the date that it was raised?

Ans. Yes, sir.

76 Q. What day?

Ans. I loaned the boat to Captain Roberts on May the 7th—Sunday was the 8th—and brought her down from the dock on Monday and went to Harrison's on Wednesday.

Q. That was the 10th of May?

Ans. Wednesday is the 11th. They went to Harrison Brothers on the 11th of May.

Q. Do you know the date that Captain Baker's barge was raised?

Ans. Yes, sir; I have it right here, taken off the book there that Mr. Kilborn has got—the 16th day of May, on Monday—listed the Baker barge and towed to Henderson. On the 17th she was at Henderson's wharf.

Q. And the date the work was done for Mr. Radcliff?

Ans. It was done when we got through up here on the 19th—the 20th—they got through the 19th and towed her down there at eight o'clock at night, and the next day did the Radcliff work.

Q. Then the boat went to Henderson's?

Ans. Yes, sir; and stayed two days.

Q. And then went to the Alabama?

Ans. Yes, sir; then over to the Alabama and the old Gulf dry dock.

Redirect examination by Mr. KILBORN:

Q. Tell the court what days there, Knudsen had her there in raising Captain Roberts' barge—what days altogether?

Ans. He went there on the 9th of the month, which was Sunday, and he left the 19th at eight o'clock—the night of the 18th he left and went to Radcliff's job.

Q. How many days, at that time, did he have her on his own job?

77 Ans. I used her three days and he had her the balance of the time. Roberts had my boat altogether, counting Sunday, twelve days, but counting from Monday, it would be eleven days.

Q. Eleven days, Knudsen had her, for which you got no pay?

Ans. Yes, sir.

Q. And that was working on the Roberts job?

Ans. Yes, sir—less the three days that I used her.

Q. At the time you say that Knudsen offered to splice her and you told him it wasn't convenient, he was a member of the crew, at that time?

Ans. Yes, sir. I could have made him splice it. He was a member of the crew then.

Q. During the eleven days Knudsen had your boat on the Roberts job, who paid the engineer?

Ans. I did, and Knudsen, too. I paid them both.

Q. Notwithstanding Knudsen was doing his own work?

Ans. Yes, sir; Knudsen will tell you that I gave him his check.

Q. Did either Roberts or Knudsen reimburse you for the pay of the engineer during the time they used your boat?

Ans. No, sir.

Recross-examination by Mr. GRESHAM:

Q. Did you have any other employment for the barge after she came down from Chickasaw, other than the Harrison job or Baker job?

Ans. No, sir.

Q. After she got down here, did you have any other employment for the boat?

Ans. Mr. Bell seen the boat and they wanted to rent it, and he came in and made a proposition to rent the boat, but he got married and then he was off a month and had pneumonia——

Q. Where is that barge, now?

Ans. I sold it to the Alabama Dry Dock and Shipbuilding Company.

78 Q. You sold it to them?

Ans. Yes, sir; in August.

Q. August, 1927?
Ans. Yes, sir; August the 17th.

Re-redirect examination by Mr. KILBORN:

Q. How long have you known Joe Knudsen and Roberts?
Ans. Ten or twelve years, and Roberts all my life. I have been loaning him for thirty years.
Q. You all have always been good friends?
Ans. Yes, sir—that is, to the extent of anything they could get from my shop.
Q. That applies to both Joe and Captain Roberts?
Ans. Yes, sir—always getting something. When they went to raise the "Apollo," Roberts came down and got all my wire sheave blocks and went over there.
Q. And that was all without charge?
Ans. Yes, sir.

Re-recross-examination by Mr. GRESHAM:

Q. After you ascertained that Captain Knudsen had cut your wire, you continued to pay him for his services?
Ans. I paid him up to June the 11th, when I let him go.
Q. What was the date that you ascertained he improperly cut that cable?
Ans. When we went over to Henderson's.
Q. And when was that?
Ans. I could tell you by consulting this paper—witness referring to the paper—Saturday, the 21st of May—that is when I noticed it.
(The witness was thereupon excused.)

79 FLOYD LENNIS, a witness called on behalf of the complainant, after having been first duly sworn, testified as follows:

Direct examination by Mr. KILBORN:

Q. You were present when Mr. Knudsen got hurt, were you?
Ans. Yes, sir.
Q. Who were you employed by at that time?
Ans. Captain Roberts.
Q. Beauregard Roberts?
Ans. Yes, sir.
Q. In what capacity?
Ans. Just doing little odd jobs for him on the boat.
Q. You were working on the tug "Sister"?
Ans. Yes, sir.
Q. That boat belonged to Captain Beauregard Roberts?
Ans. Yes, sir.
Q. Who got you to go over there that day?
Ans. Captain Roberts.
Q. Captain Beauregard Roberts?
Ans. Yes, sir.

Q. Where did you see him?
Ans. He came down to the boat.
Q. You were on board the tug "Sister"?
Ans. Yes, sir.
Q. Did he have Knudsen with him when he came down for you?
Ans. No, sir.
Q. Where was Knudsen then?
Ans. Right at that time I didn't know. He told me several days before that he was going to go there one or two days.
Q. Who was going to go?
Ans. Going over to Mr. Benson's derrick.
Q. To do what?
80 Ans. To splice some cable that was cut on the boat.
Q. Who was present when he told you that?
Ans. Nobody but he and I.
Q. He had told you he was going over to do that?
Ans. Yes, sir.
Q. On this morning Knudsen got hurt he came down and got you?
Ans. Yes, sir.
Q. Then where did you go?
Ans. Went down to Mr. Benson's and went over to the place.
Q. What did you do at Benson's place?
Ans. I didn't do anything.
Q. Did you pick up Jerry Woolsey there?
Ans. Yes, sir.
Q. And you and Roberts and Jerry Woolsey went across the river?
Ans. Yes, sir.
Q. Did you find Joe Knudsen there when you got there?
Ans. Yes, sir.
Q. What doing?
Ans. Fixing up lines and things on the boat.
Q. What happened when you got over there?
Ans. The first thing I did was to put some coal on board the derrick and after I got that finished up we were going to turn the derrick around so we could lay the boom down on the dock.
Q. The boom was up in the air?
Ans. Yes, sir.
Q. Who said they were going to turn the boat around; who gave those orders?
Ans. Mr. Joe.
Q. Joe Knudsen?
Ans. Yes, sir.
Q. He directed everything?
Ans. Yes, sir; everything that was to be done. He started getting some lines out on the dock and tying them to some stringers on
81 the dock, and they looked bad and Captain Roberts told Joe not to tie that stuff there; it would not hold, and he never paid him any mind, and I was working on the boat and they got

everything rigged up to swing the boat around to put this boom on the dock, and when he got ready he stood up there and hollered to the engineer to go ahead.

Q. Who was he?

Ans. Mr. Joe Knudsen—and he said, "Go ahead a little," and the engineer swung the boom over and he went ahead on the engine, and when he did he seen the timber or the stringer was giving away, and he stopped the engine, and that time Mr. Joe hollered "Stop her, stop her," two or three times, but the engineer had the thing stopped before he hollered; and the weight of the blocks and the chain was so heavy that it pulled that timber off the dock, and it came down and he had a line tied somehow, and it tripped him and he fell.

Q. He got tangled up in the line?

Ans. Yes, sir. I had went aft on the boat where I could see, all right, but I walked back there because I knew it was dangerous standing up there where he was at.

Q. When he hollered "Stop," the engineer had already stopped?

Ans. Yes, sir.

Q. But the weight of this block and chain pulled the stringer aloose?

Ans. Yes, sir.

Q. How much would that block and chain weigh?

Ans. I don't know, but a couple of tons, I guess, or maybe more or less.

Q. It was a very heavy affair?

Ans. Yes, sir.

Q. Was Mr. Charlie Benson over there at the time he got hurt?

Ans. No, sir.

Q. Mr. Knudsen was giving directions how to do the thing?

Ans. Yes, sir.

82 Q. What was Roberts doing?

Ans. He was around there telling Joe not to tie that stuff up there and fastening a few lines.

Q. What was Jerry Woolsey doing?

Ans. He was engineer on the derrick.

Q. Before that day had you heard Captain Roberts say anything to Joe Knudsen about splicing this wire?

Ans. Well, he did. He told Joe Knudsen that he had to go over there to Mr. Benson's derrick and splice that wire that he had cut. I was on the "Sister" that day when they came down there.

Q. Do you know where that coal came from that you were handling?

Ans. No, sir.

Q. Or who was furnishing it?

Ans. No, sir; I don't remember.

Cross-examination by Mr. GRESHAM:

Q. You say you heard a conversation between Captain Roberts and Knudsen in which Captain Roberts said to Knudsen that Charlie

Benson wanted Knudsen to splice a wire that he, Mr. Knudsen, had cut?

Ans. That happened on the street. I heard Captain Roberts tell Mr. Joe that he had to go over and splice that cable for Mr. Benson.

Q. What did Joe say?

Ans. He said he would go over there and do it.

(Thereupon this witness was excused.)

C. D. SMITH, a witness called in behalf of the complainant, after having been first duly sworn, testified as follows:

Direct examination by Mr. KILBORN:

Q. What is your business, now—you work that big lifting crane for the Merchants Transfer Company?

Ans. Yes, sir.

Q. Did you ever work for Mr. Charlie Benson?

Ans. Yes, sir.

Q. In what connection?

Ans. Engineer.

Q. On the "Chickasaw" derrick barge?

Ans. Yes, sir.

Q. Was Joe Knudsen working there at the time?

Ans. Yes, sir.

Q. Do you recall when that dredge was brought down from Chickasaw?

Ans. Yes, sir.

Q. Who brought her down?

Ans. Captain Beauregard Roberts.

Q. Was Knudsen on there then?

Ans. Yes, sir.

Q. What kind of work was Knudsen doing?

Ans. General work on the barge, and rigging.

Q. When you got down to the Southern Dry Dock, what did Knudsen do about cutting the cable or rigging the boat?

Ans. Well, we pulled up in the Southern Dry Dock there, and rigged a new cable on. That is, a part of it.

Q. Did Mr. Knudsen here, cut the cable?

Ans. Yes, sir.

Q. And left some of it on the spool, too?

Ans. Yes, sir.

Q. Had Mr. Benson said anything to him about cutting that cable?

Ans. Yes, sir.

Q. What?

Ans. He told us up at Chickasaw, if we needed any swing cable to cut off, but not to cut anything else.

Q. You had already cut the swing cable?

Ans. No, sir; we had not.

Q. How much did you have to cut for a swing cable?

Ans. Approximately 80 feet.

Q. He said he could cut the swing cable, but not to cut it for anything else?

Ans. Yes, sir.

Q. How long were you over at the Southern, rigging the boat up?

Ans. I don't know, sir. Altogether, we were over there about 10 or 11 days, I guess.

Q. Off and on?

Ans. Yes, sir.

Q. After that cable was cut, did you hear any conversation between Mr. Benson and Mr. Knudsen about its having been cut?

Ans. I heard part of it.

Q. What did you hear?

Ans. I heard Mr. Benson telling he had ruined his cable.

Q. What did he say to that?

Ans. I believe he told him if he thought it was too short he would splice it.

Q. Did he splice it?

Ans. Not then, no sir.

Q. You were not working for Mr. Benson when Mr. Knudsen got hurt?

Ans. No, sir.

Q. When did you leave the "Chickasaw"?

Ans. On or about the 26th of June.

Q. Did Knudsen leave her before then?

Ans. No, sir; Knudsen had done left the boat when I left.

Cross-examination by Mr. GRESHAM:

Q. When you heard Mr. Benson get after Mr. Knudsen and
85 Mr. Knudsen state that he would splice the cable, what was next said—what did Mr. Benson say?

Ans. I think Mr. Benson told him to wait awhile.

Q. Now, as I understand it, the new cable was rigged while the barge was over at the Southern Dry Dock?

Ans. Yes, sir.

Q. And you and Mr. Knudsen had orders from Mr. Benson to rig a new fall on the derrick?

Ans. Yes, sir.

Q. And those orders were given before the barge let Chickasaw—is that right?

Ans. Well, I could not tell. I don't remember just what he said about rigging that cable in there, but anyway he wanted a cable reaved up before we went to doing any heavy lifting.

Q. As a matter of fact, you could not do any lifting at all with the old cable?

Ans. No, sir, not to amount to anything.

Q. There were four sheave blocks?

Ans. Yes, sir.

Q. And you rigged a cable through three sheaves?

Ans. As well as I remember it, we did.

Q. It seemed to you properly rigged, at that time, didn't it?
Ans. Well, I could not say.
Q. What is your best judgment?
Ans. Because I was not experienced in ship work at that time, I could not say.
Q. Did it appear properly rigged to you, at that time—what is your best judgment?
Ans. For short lifting, yes, sir.
Q. You lifted the Baker barge with it that way?
Ans. Yes, sir.
Q. The fall did not part, did it?
Ans. No, sir.
Q. In lifting the Baker barge, the derrick barge itself, was pulled over by the weight?
Ans. It pulled her bow down some.
Q. Did Henderson's barge pull her bow down some?
86 Ans. That was a burned boat that we picked up there, and it pulled her down.
Q. And the cable worked all right?
Ans. Yes, sir.
Q. And didn't break them?
Ans. No, sir.
Q. How about in lifting Mr. Radcliff's pontoons—did the cable break then?
Ans. No, sir; that was a light lift.
Q. When was the last time you have seen that boat?
Ans. Last February was a year ago, I believe.
Q. How was she rigged then?
Ans. I don't know.
Q. You don't know how she is rigged now?
Ans. No, sir.
Q. She is still over at the Alabama?
Ans. Yes, sir; I saw the boat from this side of the river this morning.
Q. After the work of the Southern Dry Dock was concluded and those lifting jobs were concluded the boat was taken over for repairs—general overhauling?
Ans. Yes, sir.
Q. And Captain Knudsen worked on her in the overhauling, scraping and painting and so on, did he not?
Ans. Yes, sir.
Q. Now, is there such a thing as having so much of a fall on a boom and winch that the cable will rub against each other and there will be wear on the cable?
Ans. Unless you use a perch under your topping lift.
Q. Mr. Benson claimed that that cable was about ten or fifteen feet short, was that right?
Ans. I didn't hear him say how much too short it was.

Q. Mr. Smith, don't you remember testifying to that fact when you were down before the deputy commissioner?

87 Ans. I think I testified that the block lacked ten or fifteen feet of reaching down to come inside the ship, didn't I?

Q. And that was what Mr. Benson wanted it for?

Ans. Mr. Benson told us he wanted the block thirty feet below the face of the water.

Q. Mr. Benson said he wanted it to reach down to where he could take machinery, or anything out of the bottom of the ship?

Ans. Yes, sir.

Q. You assisted in rigging that fall, didn't you?

Ans. Yes, sir; I helped Joe rig it.

Q. You had some discussion about where to cut that fall, didn't you?

Ans. Yes, sir; we spoke about that.

Q. And the sum and substance of it was that it was cut at the length where you thought it was best?

Ans. To my judgment, I could not see anything wrong with it.

Redirect examination by Mr. KILBORN:

Q. Was there any discussion about your cutting it—did you tell him that Mr. Benson had said not to cut it?

Ans. Yes, sir; that morning.

Q. Did he say that he was going to cut it, anyhow?

Ans. Well, he said he thought that would be the right thing. That too much cable on the drum would be the wrong thing.

Q. But he did discuss that about them telling him not to cut that cable?

Ans. Yes, sir.

Q. Who paid you the wages while you were on this boat?

Ans. Mr. Benson.

Q. Did Mr. Knudsen pay you anything at all?

Ans. No, sir.

88 The COURT. You were asked about a four-sheave block——

Ans. The way the drum sits on the engine—when this lower spool that carried the fall, would wind up full of wire, the boom cable would come down across that and rub.

Q. That was when it went on the spool?

Ans. Yes, sir.

Redirect examination resumed by Mr. KILBORN:

Q. During the time that you were at the Southern Dry Dock, were you working on the Roberts boat—that is, raising that sunken boat in there—you came down to raise Captain Roberts' sunken boat, didn't you?

Ans. Yes, sir; that was my understanding.

Q. To raise that sunken boat?

Ans. Yes, sir.

Q. You were engaged in doing that pretty much all the time, except when you raised the Harrison boat and the Baker boat?
Ans. Yes, sir.

Recross-examination by Mr. GRESHAM:

Q. Do you know of any work that that dredge was to do, or could have done at Chickasaw, if she had not come down when she did?
Ans. How was that?
Q. Do you know of any employment for that dredge at Chickasaw—any work for her—was there anything to leave her up there for?
Ans. Nothing, only repairs. We were figuring on repairing the machine before she came to Mobile.
Q. She was repaired in Mobile, afterwards.
(The witness was thereupon excused.)

89 JERRY WOOLSEY, a witness called on behalf of the complainant, after having been first duly sworn, testified as follows:

Direct examination by Mr. KILBORN:

Q. Are you Mr. Jerry Woolsey?
Ans. Yes, sir.
Q. Were you working for Charlie Benson in July, 1927?
Ans. Yes, sir.
Q. What was your job?
Ans. Engineer on the derrick barge.
Q. Do you remember the morning Mr. Knudsen got hurt?
Ans. On July the 4th.
Q. Were you there when he got hurt?
Ans. Yes, sir.
Q. Who came by and got you that day?
Ans. Captain Beauregard Roberts and Mr. Floyd Lennis.
Q. They came and got you?
Ans. We all went across the river together, from Mr. Benson's shop.
Q. When you got over there was Mr. Knudsen there?
Ans. Yes, sir.
Q. Did you see him when he got hurt?
Ans. Yes, sir.
Q. How did he get hurt?
Ans. A piece of rotten timber swinging off the wharf there, and caught against the tow bits on the barge and the line tripped him up.
Q. Who hitched that line on the timber?
Ans. Mr. Knudsen.
Q. Who was directing how that work should proceed?
Ans. He was doing it himself.
Q. Did he holler for you to stop the engine?
90 Ans. The engine was done stopped when he hollered stop.
Q. You were operating it?

Ans. Yes, sir.

Q. Did you follow the signals that he was giving you?

Ans. I stopped before he gave me the signal to stop, because I saw something was pulling aloose. He told me to swing over and I started to swing and I didn't swing more than three feet and I stopped the boom.

Q. Was that a very heavy block?

Ans. Yes, sir; pretty heavy. I judge two hundred and fifty or three hundred pounds—the block, itself.

Q. That tripped him up and hurt him?

Ans. Yes, sir.

The COURT. What was the line tied to that piece that broke aloose, for?

Ans. To swing the barge around. It was headed broadside and we were going to swing it around so that we could lay the boom down on the wharf.

Q. It was just to turn the boat around?

Ans. Yes, sir.

Mr. KILBORN. What was Beauregard Roberts doing there?

Ans. He was there to assist in splicing. That is all I know of. Mr. Benson told me that Captain Roberts and Joe Knudsen were going over there to splice the cable and I went over there with them to handle the engine.

Cross-examination by Mr. GRESHAM:

Q. You were in the employment of Mr. Charles Benson, at that time?

Ans. Yes, sir.

91 Q. And he paid you?

Ans. Yes, sir.

Mr. KILBURN. We rest.

Mr. BIRCH. On behalf of the deputy commissioner, I offer the record in evidence.

Mr. KILBORN. We object to that as incompetent, irrelevant, and immaterial.

The court overruled the objection and Mr. Kilborn reserved exception to the ruling of the court.

Captain BEAUREGARD ROBERTS, a witness called in behalf of the defendant, after having been first duly sworn, testified as follows:

Direct examination by Mr. GRESHAM:

Q. You are Captain Beauregard Roberts?

Ans. Yes, sir.

Q. Do you knoe J. B. Knudsen?

Ans. Yes, sir.

Q. And Mr. Charlie Benson?

Ans. Yes, sir.

Q. You have known them for some time, Captain Roberts?

Ans. Yes, sir.

Q. You were present at the time Mr. Knudsen, here, was hurt on Mr. Benson's derrick barge, the "Chickasaw"?

Ans. Yes, sir.

Q. That barge was then afloat on navigable waters?

Ans. Yes, sir.

Q. What were the circumstances of your being present?

92 Ans. I was up the river and I came home and my wife said, "Mr. Benson wants to talk with you" and I rang him up, and he told me that Captain Joe had cut the wire on his derrick and that he had a chance to rent it and that he could not do nothing with it because the wire was cut—the State docks wanted to rent it and the wire was cut, and he wanted to know where Joe was, and I turned to my wife and asked her and she said, "he has gone to Pascagoula," and I asked her when he was coming back and she said, she didn't know, but she thought the next day, so I wrote a note and said Mr. Charlie said he would like to get that wire spliced. He could not do anything with the boat unless he had the wire spliced up and I told him I would try to get hold of Joe and see if I could get him to splice the wire. He said he had to have the boat to be there the day after the Fourth of July.

Q. What day was this conversation?

Ans. That was on Saturday before the Fourth of July. I had just come from up the river, and I wrote a note and left it on his bureau and my daughter was in the house and I carried my wife down to Biloxi and I left word that I would come back to Mobile and left word to my daughter to give the note to Captain Joe when he came up, and I came back on the night before the Fourth of July, and I went to my room and went to bed and I found he was in bed and next morning I got up Knudsen and got coffee and we went down and started down to the boat, and I told him, "you better go on down and get the derrick ready and I will come down and go by the boat and get Mr. Lennis to come down and help you,"—"I want to get through with it, the daughters want to go out to dinner and I want to go with them," and he said, "I have some tools on a boat, that I want," and I asked him where they were, and he said, "hanging in the cabin on the deck," and I said I would get them, and I went and got the tools and Mr. Lennis and I went down there and when we went down there they had gone over to the derrick.

Q. Who was there on the barge when you got on the barge?

93 Ans. When I went to the derrick there was an engineer there and Captain Knudsen, and I don't know whether anybody else, or not, was there.

Q. What was your interest in going over there that morning?

Ans. To try and help Captain Joe splice that cable so that Mr. Benson could get the barge to hire to the State dock. I went, merely, to help him to get the wire spliced. Mr. Benson told me he had cut it and had promised to splice it.

Q. That conversation you say you had with Mr. Benson the Saturday before Mr. Knudsen was hurt—was that in person or over the telephone?

Ans. Over the telephone.

Q. When is the first that you had known of the fact that Mr. Benson's fall had been cut?

Ans. That was the first time I knew of it being cut.

Q. Did Mr. Benson say anything to you about your being responsible for it?

Ans. No, sir. He said Joe promised to splice it.

Q. Now, that barge was, I believe, a derrick barge?

Ans. Yes, sir.

Q. It has an A frame?

Ans. Yes, sir.

Q. And a boom?

Ans. Yes, sir.

Q. This fall runs from a drum at the winch, along the underside of the boom to a block at the head of the boom?

Ans. Yes, sir.

Q. And that was a four-sheave block?

Ans. Yes, sir. It could be made even more sheaves than that. It might have been five or six sheaves—a big block.

Q. Then, it went to another sheave hanging from the boom?

Ans. Yes, sir.

Q. What is the topping lift?

94 Ans. The topping lift is what hoists the fall, that hoists the load.

Q. How long is that boom—where abouts is that A frame—about the center of the barge?

Ans. Yes, sir.

Q. Does the boom extend over the end of the barge?

Ans. Yes, sir; the boom is probably seventy-five or eighty feet long.

Q. Captain Knudsen was hurt, was he, on that derrick barge that Monday?

Ans. Yes, sir.

Q. Did he seem to be in much pain?

Ans. Yes, sir.

Q. What did you do with him?

Ans. I got a launch as quick as I could and carried him over and got the marine hospital to send for him and take him out there.

Q. Did you communicate with Mr. Benson?

Ans. Yes, sir. I told him Captain Joe had been hurt and his leg broken on the derrick, and I was trying to get him to the marine hospital.

Q. What did he say?

Ans. He said that was all right.

Q. Was that all he said?

Ans. Yes; that was all he said.

Q. Did you ask Mr. Benson to assist you in getting medical attention?

Ans. No, sir.

Q. Captain, will you look at this certificate and see if that is your signature?

Ans. Yes, sir.

Q. Tell the court the circumstances of that certificate.

Ans. Well, I rang up the marine hospital and told them a man was hurt aboard the derrick and when I took him out and went into the office and made out this certificate, I thought Captain Knudsen had been on my boat, and he had been on there, off and on, for
95 some time—probably a year or two, and when he left and went to work for Mr. Benson, was the time he left the tug, and I thought he was entitled to go to the marine hospital.

Q. Was that stated to the marine hospital at the time?

Ans. Yes, sir.

Q. Did you state to the marine hospital that Mr. Knudsen was employed by you at the time he was hurt?

Ans. No, sir.

Q. Had you had any connection with that derrick barge "Chickasaw" before you went over the morning of Mr. Knudsen's injury; had you towed her or had anything to do with her before that time?

Ans. Yes, sir; I brought her down from Chickasaw and put her over at the Southern docks. Joe was aboard of her and said I should carry her there.

Q. What were the circumstances connected with your bringing her down?

Ans. He told me he wanted it towed down there and I went up and brought her down.

Q. Captain Joe Knudsen told you that?

Ans. Yes, sir.

Q. In what business were you engaged at that time?

Ans. I was engaged in towing on the river here.

Q. For whom?

Ans. Towing lumber for the Mobile River Saw Mill Company at Mount Vernon.

Q. Had Mr. Knudsen worked for you at all, after he went to work for Mr. Benson?

Ans. No, sir.

Q. And was he employed by you the morning he was hurt?

Ans. No, sir.

Q. Did you have any further connection with that derrick barge; her name is the "Chickasaw"?

Ans. Yes, sir.

Q. Did you have any further connection with the "Chickasaw" after you brought her down, and up to the day of Mr. Knudsen's injury?

96 Ans. After I put her over there I didn't have any connection with her at all until the morning we went there to tow her away, or the evening we went there to tow her away.

Q. Where did you tow her to?

Ans. To the east side of the river and from there down to Mr. Radcliff's wharf. Mr. Knudsen said Mr. Benson ordered him to bring her down there to pick up some boilers, and I carried her down to Mr. Radcliff's wharf.

Cross-examination by Mr. KILBORN:

Q. How long have you known Mr. Charlie Benson?

Ans. I suppose fifteen or twenty years.

Q. And Mr. Knudsen?

Ans. Well, I met Captain Joe out there the second year of the war, at Chickasaw.

Q. Mr. Knudsen lived at your house until the time that he was injured?

Ans. He had a room at my house at the time this thing occurred.

Q. You and Mr. Knudsen and Mr. Charlie Benson have always been close friends, for a long time?

Ans. Yes, sir.

Q. And doing each other mutual favors all along?

Ans. Yes, sir.

Q. And you had a derrick barge of your own?

Ans. Yes, sir.

Q. And Joe Knudsen got a job to raise the sunken "Apollo" over the river?

Ans. Yes, sir.

Q. And you loaned Joe Knudsen your derrick barge, as an act of friendship, to use in that operation?

Ans. Yes, sir.

Q. And while it was over there a norther came up and sunk your boat in the slip?

Ans. Yes, sir.

97 Q. And you had no way to raise it?

Ans. No, I loaned it to Captain Joe, and I considered it his business to get it up.

Q. Did you talk to Mr. Charlie Benson about borrowing Mr. Benson's derrick to raise your sunken boat?

Ans. No, sir; I did not.

Q. You didn't talk to him?

Ans. No, sir.

Q. Do you remember meeting him in the Square one night, with Joe Knudsen, and having a conversation with him?

Ans. I met him several times, but I don't know.

Q. You were in the habit of meeting him in the Square a good deal?

Ans. Yes, sir.

Q. And Joe Knudsen would be along?

Ans. Sometimes and sometimes not.

Q. Would you say that such a conversation did not exist?

Ans. I don't remember having a conversation asking Mr. Benson for the derrick, because Joe said he had made arrangements with Benson for the derrick. I don't know how he got it.

Q. You don't deny having such a conversation in the Square with Mr. Benson, but you simply don't remember it?

Ans. I don't remember, and I am pretty sure I never said anything to him about the derrick.

Q. Your recollection is that Joe Knudsen told you he had arranged with Mr. Charlie to borrow that derrick to use?

Ans. Yes, sir. He didn't say he borrowed it. He said he had made arrangements for the derrick.

Q. After he told you that you went over to Chickasaw with the tow boat and toward the derrick down to the Southern?

Ans. Yes, sir.

Q. And never charged Charlie Benson anything for that?

98 Ans. No, sir.

Q. You understood he was letting Joe have the barge, and you were glad to get it and didn't expect to charge him?

Ans. Mr. Benson can not say that I charged him anything for the derrick, or Captain Joe, either one.

Q. Captain Joe set about raising your boat across the river?

Ans. Yes, sir.

Q. He pulled the deck-house off it with that derrick, didn't he?

Ans. I don't know. I guess he did. It was pretty well broken up when I got there.

Q. He pulled the kitchen off?

Ans. Yes, sir.

Q. And, finally, he lifted it up?

Ans. Yes, sir.

Q. And you all set it up on the bank?

Ans. Yes, sir.

Q. And you were there?

Ans. Yes, sir.

Q. After he got through with that you hitched on to Mr. Benson's derrick with your tug and towed it where?

Ans. To Radcliff's dock.

Q. And left it there?

Ans. Yes, sir.

Q. And you made no charge for that?

Ans. No, sir.

Q. When did Mr. Charlie say anything to you about Mr. Joe Knudsen having cut his cable?

Ans. When I came back from up river at night, over the telephone.

Q. Is that the only time he ever mentioned the matter to you?

Ans. I think he talked a good deal after that about it, but up to that time that was the first time. After he was hurt he kept talking about the cable and about getting it spliced and he said he didn't

know what he was going to do, and finally, he told me somebody at the L. & N. was going to splice it.

99 Q. When was that?

Ans. After Joe got hurt.

Q. Don't you recall that before Joe got hurt—for the purpose of refreshing your memory—before Joe got hurt, Mr. Charlie called you up and asked you to come to the shop and you came by there, and didn't Miss Albertine Lea, Mr. Benson's bookkeeper—you know her?

Ans. Yes, sir.

Q. And she was there, and Mr. Herring, here to-day as a witness, he was there also, and this happened before Mr. Knudsen got hurt, and that he told you then that he was looking to you to get that cable spliced, and you all sat there and discussed it quite a while, and finally you told him you would try to get that Jamaican negro that makes maps to splice it?

Ans. All of that happened after Captain Joe got hurt.

Q. You are sure of that?

Ans. Yes, sir; because I went to Biloxi until the 4th of July and never talked to him.

Q. Do you remember having any conversation about the splicing when Miss Albertine was present, and Mr. Herring?

Ans. I remember talking to Mr. Benson two or three times afterwards, and he said a man at the L. & N. was going to splice it, and he then said he could not splice it, and I said I have had a negro on my boat that could splice that in a couple of hours.

Q. You say that conversation was had after Captain Joe got hurt?

Ans. Yes, sir; afterwards.

Q. The day you left with Mr. Knudsen, and the day Knudsen got hurt—tell how he got hurt.

Ans. When I got over there he was on the bow of the boat.

Q. Knudsen?

Ans. Yes, sir. And I got over there with Mr. Floyd Lennis and Captain Knudsen said he wanted to swing the barge around

100 and let the boom down on the wharf so that he could unreave it, and he picked up a line hanging to the boom and carried it over and made it fast on the wharf, and he tied it around a little stringer on the wharf. I told him "you better not tie that there—put it on the piling," and he said, "you go back there and attend to those lines on the stern of the barge, I will attend to this," and I went back, and I heard somebody holler and I turned around and looked and I saw his heels up in the air, and his head down, and I got them to slack down on the wire and brought him to town.

Q. He was directing how things were to be done that day?

Ans. Yes, sir.

Q. You had carried Mr. Lennis over there with you?

Ans. Yes, sir.

Q. And he was working with you?

Ans. Yes, sir; for me.

Q. As a matter of fact, you went down and got Lennis and came by Benson's shop and picked up Jerry Woolsey?

Ans. We never went to Benson's shop. We went right on the wharf.

Q. You never went by and got Mr. Woolsey?

Ans. No, sir; I think he was already over there.

Q. Had you made any arrangements to charge Mr. Benson for your services that day?

Ans. No, sir.

Q. Or for Floyd Lennis' services?

Ans. No, sir.

Q. What was your idea of assisting in that?

Ans. I wanted to get the wire spliced because he told me Joe had cut it and he had a chance to rent it if he had it spliced.

Q. What concern was it of yours that Joe had cut it?

Ans. He claimed that Joe had cut the wire in raising my boat, and of course, if he cut the wire in raising it, I wanted to do all I could to help him get it back.

101 Q. You went over there that day to assist in this operation out of the consciousness that he was a good enough friend to loan you his boat and you would be good enough friend to help fix the cable?

Ans. Yes, sir.

Q. You had no idea that he was to pay either you or Knudsen for what you were doing over there that day?

Ans. No; I knew he wasn't going to pay me, because I never made him any charge for it.

Q. And you knew he didn't expect to pay Knudsen?

Ans. Joe told me he had arranged for the derrick, and I didn't know whether Joe was going to pay him or he pay Joe, or how. He had been working for Mr. Benson.

Q. He had quit working for Mr. Benson some time before he got hurt there, hadn't he?

Ans. I don't know exactly how long he was off the barge. The barge was over the river when I came back home, and he was away, but I don't think it was very many days.

Q. You have talked to Mr. Benson a good deal about this case since it came up, haven't you, off and on?

Ans. Yes, sir.

Q. And told him more than once that you thought it was a shame that Joe was suing him?

Ans. I told him I thought it was a shame for him to sue Mr. Benson, and I even got my wife to go to Captain Joe and tell him I thought he ought not to sue Mr. Benson. I really could not see if he loaned him the barge and he hurt himself, and I could not see why it was a case against Mr. Benson.

Q. Did you tell Mr. Benson that you knew that Joe wasn't working for him?

Ans. No; I didn't tell him that, because I didn't know any arrangements that he had in regard to his work with Benson, but I tried to stop the lawsuit in any shape or form between them. They
102 were both friends and I didn't want to see them fussing and fighting.

Q. You felt that it was unjust for him to sue Mr. Benson?

Ans. Certainly I did, and I feel so now, so far as I am concerned.

The COURT. You say, in discussing the first arrangement for getting the barge out and raising your barge—how did it come about that Knudsen told you he had made arrangements for the use of that derrick barge—how did that come about?

Ans. He was working on Mr. Benson's derrick up in Chickasabogue—digging it out of there for him—and that was the time he had moved my derrick and was using it.

Q. Was he using your derrick when your derrick was sunk?

Ans. Yes, sir; he wasn't using it that very day, but he had been using it and tied it to the wharf.

Q. That was for you?

Ans. No, sir; that was for himself. I didn't charge him for the derrick.

Q. That was Joe, and not Benson.

Ans. It was Joe.

Q. It wasn't Benson's job at all?

Ans. No, sir.

Q. It was tied there and sunk?

Ans. Yes, sir.

Q. Then what conversation took place between you and Knudsen in reference to raising that barge?

Ans. The dry-dock people said they wanted to get the barge out of there—she was in the way—and I got ahold of Captain Joe and asked him about it, and he said, well, he had made arrangements with Mr. Benson to use his derrick and pick her up, and as
103 soon as he could he would pick her up, and to help the thing along I went up there and towed her down and got her over there.

Cross-examination resumed by Mr. KILBORN:

Q. Mr. Knudsen had contracted, on his own account, to raise the "Apollo"?

Ans. Yes, sir.

Q. And he borrowed your boat and you loaned it to him as an act of friendship in that job?

Ans. Yes, sir; and she was sunk. I wasn't charging him anything for it.

Q. Is the whole of this paper in your handwriting, or just the signature?

(Mr. Kilborn referring to the certificate, which had been introduced in evidence.)

Ans. It is all in my handwriting.

Mr. KILBORN. That is the master's certificate that he gave at the marine hospital.

Q. Can you read this down here where it says "Nativity,"—you wrote the same thing that is printed in your handwriting?

Ans. Yes, sir.

Q. Read this there, where it says "color of eyes."

Ans. "Color of eyes, blue,"—brown, isn't it?

Q. What is this "In my employ"?

Ans. It was in my employ.

Q. You wrote, in your handwriting, that he had been in your employ on the boat?

Ans. Yes, sir.

Q. Can you read the next thing?

Ans. That is, off and on, for ten years. He had been in my employ, off and on, for ten years.

Q. The words, "off and on" are not there, though, are they?

103 Ans. No, sir; they are not, but he was on the boat.

Q. All that is on this paper is the statement that he had been in your employ?

Ans. Yes, sir.

Q. Without any statement that it was "off and on"?

Ans. I meant it over ten years back, up to that time. From the time that he first started to work for me on the boat.

Redirect examination by Mr. GRESHAM:

Q. How much experience has Mr. Knudsen had as a rigger?

Ans. I guess a good lot. He was under me for two years at Chickasaw.

Q. Right after the War?

Ans. Well, during the War.

Q. And he has been working, off and on, ever since?

Ans. Ever since the War, off and on.

Q. You say he was a competent, experienced rigger?

Ans. Yes, sir.

(The witness was thereupon excused.)

J. B. KNUDSEN, a witness called on behalf of the defendant, after having been first duly sworn, testified as follows:

Direct examination by Mr. GRESHAM:

Q. Is your name J. B. Knudsen?

Ans. Yes, sir.

Q. You are one of the respondents in this case?

105 Ans. Yes, sir.

Q. And you were hurt on the derrick barge, "Chickasaw," that belonged to the complainant in this case, on July the 4th, 1927?

Ans. Yes, sir.

Q. Tell the court about the condition of your leg?

Ans. My leg is practically stiff—without any motion.

Q. Is it any shorter than the other?

Ans. Yes, sir; I have the heel built up on my right foot about an inch higher than my left foot, and it is still shorter.

Q. What is the length of your right leg shorter?

Ans. I think it is about two inches shorter, or over two inches or more.

Q. You have heard the testimony in regard to your being hurt on that derrick barge?

Ans. Yes, sir.

Q. Well, are the circumstances as stated by the witnesses correct?

Mr. KILBORN. We object to the form of that question.

Q. You were hurt on the barge "Chickasaw" in navigable water?

Ans. I was on the barge "Chickasaw," in navigable water, and there was a seagoing ship laying within fifteen feet of us.

Q. What experience have you had as a rigger?

Ans. All my life rigging and sailing.

Q. How many years?

Ans. Forty years.

Q. The time that you worked for Mr. Benson—that has been testified about—is that the only time you have been employed by Mr. Benson—when did you go to work for him on this barge "Chickasaw"?

Ans. I went to work for him on the barge "Chickasaw" up at Chickasaw.

106 Q. What kind of work were you doing there?

Ans. We were using a bucket to dig out mud with, to take her out of there.

Q. What did Mr. Benson tell you he was going to do with that derrick barge?

Ans. He said, when we got her out of here we want to rig her up for heavy lifting in the river, and he also brought me out a spool——

Q. That was a spool of what?

Ans. Of wire.

Q. For what purpose?

Ans. To rig up Mr. Benson's barge with.

Q. For what part of the barge?

Ans. The topping lift and the hoisting fall.

Q. What was the condition of the topping lift and the hoisting fall?

Ans. It was three quarter wire, and that wire was there since the War, and they were using it there in the War and that wire was exposed to all kinds of weather.

Q. Was it safe?

Ans. No, sir; it was not safe. It was decayed and rusty in places.

Q. Did you dig her out?

Ans. The first thing we did when the wire came up—we put a topping lift on that boom to keep that boom from dropping down on us. That was the most important thing of all things, and Mr. Benson asked me could we use that three quarter wire for the bucket to dig out with, and I said, "we can use it and save that new wire,

and if it does break it can't hurt anything," and he said we would take chances on it and use that three quarter wire until we got out, and we would reave up the new wire.

Q. Did you dig you way out of the slip?

Ans. Yes, sir.

Q. Then what happened?

Ans. When we got out there Benson ordered us—he was telling me that Beauregard Roberts is coming up with his tug boat and take us down to the Southern Slips, and he said, "when you
107 get down there that will be a good chance for you to rig up that long fall with the new wire."

Q. Had you borrowed Captain Roberts' derrick barge?

Ans. The barge that was sunk in the slip, there?

Q. Yes.

Ans. I will explain how that came about. The Southern Dry Dock people were using Captain Roberts' barge in there and they had me as an operator on that barge, and when I was operating that barge for Beauregard Roberts I got paid from the Southern people and Captain Roberts got paid, also.

Q. Did you have the job of raising the "Apollo," over there?

Ans. I had a job raising the "Apollo," yes.

Q. Were you using Captain Roberts' barge in that connection?

Ans. I was.

Q. And you left it there when you went to work for Mr. Charlie Benson?

Ans. Yes, sir.

Q. They were going to take care of that barge and the barge sunk?

Ans. Yes, sir; over in the slip, and they were going to watch it.

Q. When the derrick barge was brought down from Chickasaw, where was it put; in the Southern Slip?

Ans. In the Southern Slip.

Q. Then what was done?

Ans. Mr. Charlie Benson said, "When she goes in there you will have a good chance to rig up that new wire. We are going to have some heavy work in this river, and we knew that old wire was impossible."

Q. Did you rig that fall then?

Ans. Yes, sir; I rove up three sheaves.

Q. How many sheaves were in the block?

Ans. Four sheaves.

Q. Explain your reason for so reaving it.

108 Ans. I reaved up three sheaves. They were very large blocks—five hundred (500) pounds apiece, and I rove up three sheaves, and that made it six parts, and a standing part came down, which made it seven parts, and Charlie Benson said, "Joe, don't use any more wire in that fall than you can possibly help, because we use that new wire for other purposes, like swinging cable

and that bull wheel, and that guy for the boom, and we have one guy on each side and if anything should happen to the old guys." I took this up with Engineer Smith, who had been on the boat longer than I have, and he said, "Yes, that is right, because we can not put any more wire in that fall because it interferes with the topping lift."

Q. Explain how it does.

Ans. They get so much wire on that drum that it makes a friction with the other wire that holds up the boom.

Q. What is the topping lift made fast to?

Ans. It comes down through the mast and goes over the heel of the boom and goes back up again to the top drum and by having too much wire on the lower drum it gets up against the other drum with the topping wire on it.

Q. Did you rig that fall with three sheaves?

Ans. We rove it up and then Smith says, "We have plenty of steam power here, and if you rig up three sheaves I won't have to use half of the steam power to put the bow of that barge under the water."

Q. Did you consider, at that time, from your experience, that that fall was properly rigged, under all circumstances?

Ans. Yes, sir; and I had the engineer there, Mr. Smith, and he suggested doing it that way, and why I done that, Mr. Benson said, "Joe, how are you going to rig that fall," and I said, "three sheaves,—do you think that is all right," and he said, "yes."

Q. When was that?

Ans. Before I rove it up.

Q. You had that conversation with Mr. Benson?

109 Ans. Yes, sir; and Benson said, "Knudsen, you are the rigger—use your own judgment,"—and that is the reason I took it up with the engineer.

Q. What happened after you rigged the fall?

Ans. Then we rigged up the fall and everything was satisfactory—three sheaves and a standing part, down to the bottom block.

Q. Then what was done?

Ans. Then we hove the boom up like that, at about a 95 degree angle.

Q. What was done with the derrick barge?

Ans. We went down to Harrison's Dock and we lifted up a sunken boat that lay on the end of his ways. Mr. Harrison wanted that boat out of there.

Q. What sort of boat was it?

Ans. A river boat. I believe she had been a stern wheeler.

Q. You lifted that boat up with that fall?

Ans. Yes, sir; and she had big boilers on there, machinery and all.

Q. What did she weigh?

Ans. I know I lifted 40 ton and more, dead weight.

Q. Then what happened?

Ans. We went back up to the Southern Dock, and then there was a call came that Baker wanted it and we went and took Baker's derrick up and took it down to Harrison's Dock.

Q. Then what happened?

Ans. Then I think we went back up to the Southern Docks and then I went to work with Beaury Roberts' boat, and I tried to do some work on that in between times, and a call came again, and to my recollection I had Dr. Roberts' boat up, and a call came again to come down to Radcliff's Wharf and pick up those boilers for Radcliff.

Q. Then what was done?

Ans. Then we went over to Henderson's Dry Dock. Mr. Charlie Benson had an old sunken barge, and he said, "Knudsen, do you think we can raise that barge up?" and I said, "We can try it, I believe we can," and he says, "can you fasten those wires so that they can hold that barge up," and I said, "I will try it—I think so," and I put the wires on that, in the way I thought it would be all right, and then I notified Mr. Benson, "that we are ready now," to make the lift, and Mr. Benson changed his mind, and he says, "Knudsen, never mind. You can take the wires off that barge and put it on the 'Chickasaw,' and we are going over on the dry dock at the Alabama."

Q. Did you go back on dry dock?

Ans. Yes, sir.

Q. What was done on dry dock?

Ans. General repair work of all kinds.

Q. What did you do?

Ans. The same thing—scraping and painting.

Q. Did you do scraping and painting, yourself?

Ans. Yes, sir.

Q. Did you assist to put a roof on the cabin?

Ans. I did.

Q. You used hammer and nails, yourself?

Ans. Yes, sir.

Q. Did you do any work on that fall?

Ans. Yes, sir; when we came over on the docks, Mr. Benson brought out a big pair of blocks with six sheaves in those blocks, and he said, "Knudsen, do you think those blocks will be better than we have" and I said, "no, the blocks we have are the best blocks," and he said, "Knudsen, I want you to try and rig this wire up into those six sheave blocks and let me see how they go," and naturally, if I rigged up the wire into three sheave blocks and cut my wire for that, they are not going to fit those six sheaves, and I rove it up six sheaves, and Benson said, "Now, the wire is too short," and I said, "Sure it is." Then we took the blocks off again, and rigged up the other four sheaves.

Q. Did you do that work?

Ans. Yes, sir; I rove up those other blocks that we had already three sheaved, and I was attending to work for Mr. Benson.

111 Q. Was anything said about splicing?

Ans. Sure. He said, "Knudsen, don't you think that wire is too short," and I said, "That wire is not too short; that wire is just right, if you take my advice, because I cut it to be O. K. and do the work as it is; and if it is any longer it will do more harm than good." "Now, if I used those six sheave blocks it would be too short, but when I rove up the new fall you were going to have the blocks that we had." He said, "Well, Knudsen, if I want that wire spliced I will call on you."

Q. What did you say?

Ans. I says, "All right." He says, "Can you do that work?" and I said, "Yes; I can—that is my profession."

Q. Have you spliced falls before?

Ans. Yes, sir; several of them.

Q. How many?

Ans. A good many of them.

Q. Was that part of your work as a rigger?

Ans. Yes, sir. You cannot call yourself a rigger if you cannot splice a wire fall, and I had rove up those three sheaves like it had been before, and we were still laying on the Alabama Docks there and there wasn't much to do, and Benson said to me, "Knudsen, rig up those six sheave blocks again," and I did, and I left it there, and I oiled up his wire, and he asked me to do that so that it would not rust, and we left the blocks in that condition with the six sheaves, and I went to cleaning up the engine and putting the roof on the cabin.

Q. Was anything else said about splicing up to the time of leaving his employment?

Ans. Yes, sir; he says this, "Knudsen, if I decide I want this wire spliced, can you do it," and I said, "Sure, I can," and he says, "Will you splice this wire for me if I ask you to," and I said, "I will come and splice it for you; yes." I said, "Do you want me to splice it now," and he said, "No; I am in no hurry; we will wait a while," and I worked until I didn't think there was anything more to do and I went to Charlie and I told him I didn't think there
112 was any work left for us to do. "The boys ain't doing much, and I know I ain't doing anything, and I want to quit," and he said, "All right, Knudsen, any time I want you to work, will you come back and work," and I said, "Yes; I will work for you, Charlie," and he said, "You can splice this wire when I call on you," and I said, "I will," and then the first thing you know, I had a telephone call from Charlie Benson.

Q. Who gave you the message?

Ans. I had a telephone call from Charlie Benson and he said, "Joe——

Mr. KILBORN. We object unless the witness states that it was with Mr. Benson.

Q. Did you talk to Mr. Benson?

Ans. Yes, sir. I said, "Who is this?" over the phone, and he said, "Charlie Benson," and he said, "Joe, I want this wire spliced in a few days. I have got a young man engineer and I think he is all right," and I said, "It don't make any difference with me if the man is all right," and he said, "I will let you know in a few days," and then I went down the coast a few days, and when I came back—I think it was Saturday night—I came back and there were two slips written; one pinned onto my pillow in my room and the other on the dresser.

Q. Where were you living at that time?

Ans. With Captain Beaury Roberts. And stating, "Captain Knudsen, will you come down Monday morning and splice this wire for Mr. Charlie Benson? He has some work to do with the derrick on Tuesday and he wanted it done on Monday." And this happened to be the Fourth of July, and I thought to myself, well, I will go down and splice it. I promised him to do it and I will go, and I says to Captain Roberts, "I will splice it."

Q. You went down Monday to splice the wire?

Ans. Yes, sir.

Q. What would you have to do to splice the wire? Did you have to lower away the blocks?

118 Ans. The barge was laying on the north end of the Alabama docks, that I call Pinto Pass, and the boom was facing to the eastward, into the open water, and we had to turn this barge this way, so that I could lay that boom down on the wharf to unloosen the block.

Q. Did you have to unrig the fall as it was rigged, and then rig it back after the splice was made?

Ans. Yes, sir.

Q. That was what you were preparing to do when you hurt your leg?

Ans. Yes, sir.

Q. Have you been able to do any work since you were hurt?

Ans. No, sir.

Cross-examination by Mr. KILBORN:

Q. This phone conversation that you just told about—you didn't tell us about that on the other trial of this case, did you?

Ans. With the suffering I had——

Q. You didn't mention it on the other trial, did you?

Ans. With the suffering——

Q. Just answer the question: did you mention it?

Ans. No, sir.

Q. This is the first time you brought it out?

Ans. It just came to my mind. The suffering I had——

Q. On the other trial you were asked all about the circumstances of your employment and told nothing about this phone conversation with Mr. Benson.

Ans. I don't think I thought of it. I am not sure whether I did or not, but I have been studying it.

Q. You have been staying at the marine hospital with nothing to do but think about the case, and you thought about all of this?

114 Ans. I have been out there because I was disabled to go anywhere else, and I have been in pain.

Q. How long have you known Captain Beaury Roberts?

Ans. A good while.

Q. And known Mr. Charlie Benson a long time?

Ans. Yes, sir.

Q. And all three of you were good friends?

Ans. Pretty fair.

Q. You were pretty close friends, were you?

Ans. I don't know. I know of one thing, whenever I work for Charlie Benson, I expect pay for it.

Q. You borrowed Captain Beaury Roberts' barge without expecting to pay him for it?

Ans. In a way, I paid him. I made trips on his boat up and down the river.

Q. A sort of mutual friendship feeling between you and Beaury Roberts?

Ans. Yes, sir.

Q. You had Beaury Roberts' barge, raising the "Apollo"?

Ans. Months before that.

Q. You were using Beaury Roberts' barge across the river for that purpose?

Ans. Not only for that purpose; the Southern Docks used the barge, also.

Q. You did have a contract to raise the "Apollo"?

Ans. I did, several months before that.

Q. What were you to do?

Ans. Try to float that thing.

Q. For which you were to get so much money?

Ans. If I floated her; yes.

Q. And, you borrowed Beaury Roberts' barge in order to carry out that contract?

Ans. Yes, sir.

Q. And it sunk over there?

Ans. Yes, sir.

Q. In a norther?

Ans. In a norther.

115 Q. Didn't Beaury Roberts come to you and tell you that he had arranged with Charley Benson to use the barge?

Ans. I don't know.

Q. Didn't you testify, on the previous trial of this case, as follows: "The first thing that Beaury told me about it, is that Benson is going to let me have the derrick for a day or two." Did you state that?

Ans. When we left Chickasaw.

Q. Just answer the question, whether you testified to that or not.

The COURT. Before you left Chickasaw.

Ans. Before I left Chickasaw, Beaury Roberts came up for the barge and said, we were going down to the Southern Docks with the barge, and if I remember right, he said we could use Benson's derrick in between times.

Q. Didn't you testify to this on the other trial: "Captain Beaury Roberts was the first one that told me about that, about using the barge, and said, 'Charlie is going to loan us his barge a day or two'?"

Ans. Yes, sir; I believe so.

Q. Is that what happened?

Ans. Yes, sir.

Q. Do you remember meeting Mr. Charlie Benson one night, in the square, along with Captain Beaury Roberts, and the conversation having taken place about the use of Captain Benson's barge in raising the Roberts' barge?

Ans. I remember being in the square, and they were talking different things between themselves that I was not interested in, and what the conversation was, I don't know.

Q. Was there anything said, in that conversation, about using the Benson barge in raising Roberts' barge?

Ans. Not in the square—I don't know.

Q. Was there anything said in the other conversation?

116 Ans. They were talking. I wasn't much interested.

Q. Where were you?

Ans. I was sitting on the end of the bench.

Q. What were they talking about?

Ans. I don't know.

Q. Was there anything said, at all, about raising the barge that you had and that had sunk?

Ans. I don't know nothing about it.

Q. I will ask you, on the previous trial of this case, whether you were asked this question and made this answer: "On what arrangement did you have the use of Mr. Benson's barge, in raising the Roberts barge—Ans. Captain Beaury Roberts said we could use it—Benson said we were going to have his barge one or two days."

Ans. That is right, and Beaury said that Benson said to Beaury, or someone was telling me that we could have the barge for one or two days.

Q. Captain Beaury Roberts came to you and told you he had arranged with Mr. Benson to get his barge to raise his barge?

Ans. I don't know whether it was Beaury or Benson, but someone told me.

Q. You testified, in the other hearing, that is was Beaury that told you.

Ans. I think it was Beaury—that is my recollection, but I am not sure.

Q. And Beaury came and got you with his tug and towed you to the Southern dry dock?

Ans. Yes, sir.

Q. For the purpose of raising his barge?

Ans. Yes, sir; for the purpose of doing work in the river—they got the new fall.

Q. Up to that time you didn't have any work?

Ans. Harrison was telling me about wanting his barge raised, before we got there, I believe.

Q. Are you positive?

Ans. I know it came up before I had my fall rigged up.

117 Q. Will you swear that Harrison told you?

Ans. Yes, sir.

Q. Let me finish the question—will you swear that before you got to the Southern with this derrick that he wanted to use it in raising his barge?

Ans. Yes, sir; I think there was talk of it down on the wharf before I got to the docks; but just as I got to the Southern docks Harrison was there, and he said he wanted that barge.

Q. You are not positive about having seen Harrison before, are you?

Ans. Yes, I think so. He was telling me he wanted that barge raised.

Q. You got to the Southern and you started to rig this fall up and you cut Mr. Benson's cable in the operation?

Ans. I knew all about raising Harrison's barge before I put the new fall on there. I had been notified of it.

Q. Mr. Benson had asked you not to cut his cable, hadn't he?

Ans. No, sir, he asked me to put in the new fall.

Q. Did he tell you he didn't want that cable cut, except for the topping lift and that bull wheel?

Ans. No, sir, he said, "you want to use that cable for the new fall."

Q. When you went to cut it, did you have any conversation with Smith, the engineer?

Ans. We laid the boom on the wharf and rove up the fall and cut it where we thought it would be best.

Q. I will ask you whether or not Smith told you, at that time, that Mr. Benson had said he didn't want the cable cut?

Ans. He didn't want it cut for any purpose except the fall—that is what Benson meant by that.

Q. He had said he didn't want it cut?

Ans. He said he had work to do in this river, and he had to have that new fall rove in, and that is what we came down to the Southern dock for, and that is what he shipped the spool of new wire up there for.

118 Q. When did you first talk to Mr. Benson, or when did Benson first kick to you about cutting the cable?

Ans. Sometime afterwards, Benson said, "Knudsen, do you think that is long enough," and I said, "Yes."

Q. When was that?

Ans. A long time afterwards.

Q. Before you quit working on the derrick?

Ans. Yes, sir.

Q. How long before?

Ans. A couple of weeks.

Q. Do you know whether Benson said anything to Captain Roberts about it?

Ans. Not to my knowledge.

Q. On that day you were hurt you had no conversation with Benson, at all?

Ans. He says, "Knudsen, will you come back and work for me when I call on you"?

Q. I asked you to tell me whether you had any conversation with Benson on the day that you were hurt?

Ans. No, sir.

Q. Where were you when you had the telephone conversation you told about?

Ans. I was out to Beaury Roberts' house and it rang, and it says, "Is this you, Joe," and I said, "Yes, who is this—Charlie Benson," and he said, "Yes," and he said, "Joe, can you come down and splice my wire"?

Q. How long was that before you came down and spliced it?

Ans. Five or six days—about five days before I got hurt.

Q. Did you mention that to Captain Roberts?

Ans. I don't know if I did or not. I think I told Captain Roberts that Benson wanted me to come down and splice that wire.

Q. How long were you at Pascagoula?

Ans. Saturday morning—I think I went on the night trip.

119 Q. You went down Saturday?

Ans. No, I said it was Friday night, to my recollection.

Q. And you came back the following Saturday night?

Ans. Saturday night.

Q. You had been down there, how long?

Ans. Just a day and a night.

Q. Do you know what day Mr. Benson paid you off on that dredge boat?

Ans. No, I don't.

Q. About June 11th, wasn't it?

Ans. I think it was about that time, the 11th or the 15th.

Q. Did you ever call on Benson for any money for the work you did on the day you got hurt—July the 4th?

Ans. I never did see Benson from the time I was up there until we met up here in court.

Q. You wrote him a note and asked him to tell you how long you had worked for him?

Ans. Yes, sir.

Q. And in that note you said nothing about his owing you any money?

Ans. He asked me what I wanted to know that for, and he said, "Yes, I am going to try to get your compensation or get something."

Q. Who said that; you?

Ans. I never saw Charlie Benson until the time of the last trial.

Q. And in the note you wrote him, you didn't say anything to him about his owing you for the time you worked, the day you got hurt?

Ans. I don't think I did.

Q. All you asked him was to tell you how long you had worked there for him during the time you had worked for him?

Ans. Yes, sir.

Q. When was the last time you worked on the tug "Sister"?

120 Ans. I don't know.

Q. Tell the court your best judgment, as to when you last worked on her?

Ans. I worked on the "Sister" very often off and on.

Q. Had you worked on the "Sister" at all from February, 1921, up to the day that you got hurt?

Ans. Yes, sir; I think I made a trip with the old man up and down the river a day or so.

Q. Was that before you got paid off on Mr. Benson's dredge, or afterwards?

Ans. That was before I got paid off, I believe.

Q. After Benson paid you off the "Chickasaw," did you work on the "Sister" any more?

Ans. Yes, I worked on the "Sister," off and on.

Q. Let me get this straight. After Mr. Benson paid you off from the "Chickasaw" on June 11th, did you work on the tug "Sister"?

Ans. I don't know.

Q. What is your recollection?

Ans. I can not say.

Q. Had you gotten any money from Mr. Roberts from June the 11th up to the time that you were hurt?

Ans. No, sir.

Redirect examination by Mr. Graham:

Q. Did you, at my instructions, go to, or communicate with, Mr. Benson, asking him for the dates of your employment with him?

Ans. Say that again.

Q. Did you, at my instructions, communicate with Mr. Benson and ask the dates of your employment by him?

Ans. Yes, sir.

Mr. Graham. Have you got that note, Mr. Kilborn?

Mr. Kilborn. Yes, here it is.

(Mr. Kilborn produced a paper.)

Q. Is that the note Mr. Kilborn is referring to, wherein you did not demand wages—have you had any communication with Mr. Benson since you have gotten hurt?

Ans. The only communication I had, to my recollection,—I asked Mr. Benson how long I worked for him and when I went to work and the time I quit work—to my recollection.

Q. Is that your handwriting?

Ans. No.

Q. Was it written for you?

Ans. I think so.

Mr. GRESHAM. I offer that letter in evidence.

Q. Were you employed by Mr. Benson, of the Benson Sheet Iron and Metal Works at the time you were hurt?

Mr. KILBORN. We object to that because it invades the province of the court.

The court overruled the objection.

Ans. Yes, sir.

Mr. GRESHAM. In connection with the cross-examination of the witness, I want to offer in evidence the witness' testimony before the deputy commissioner with regard to that telephone call, on page 48. I want to offer, specifically, pages 47, 48, and 49, simply as explaining that portion of the cross-examination.

Q. What was your wage rate paid you by Mr. Benson?

Ans. Five dollars ($5.00) a day.

Q. Did you work six days a week?

Ans. Yes, sir.

(The witness was thereupon excused.)

Mr. GRESHAM. The respondent thereupon, rested.

Miss ALBERTINA LEE, a witness called on behalf of the complainant, after having been first duly sworn, testified as follows:

Direct examination by Mr. KILBORN.

Q. Do you work for Mr. Charlie Benson?

Ans. Yes sir.

Q. How long have you worked for him?

Ans. Since the 19th of July, 1921.

Q. In what capacity do you work there?

Ans. As bookkeeper and typewriter.

Q. Has he any other office help besides you, there?

[illegible] sheet shop, there?

[illegible] Sergeant Roberts?

[illegible] him?

Ans. [illegible] I worked for Mr. Benson.

[illegible] at the shop?

[illegible] talking to Mr. Benson at [illegible] splicing that wire, across the [illegible]

Ans. How was that?

Q. Did you see Captain Beauregard Roberts at Mr. Benson's shop in conversation with Mr. Benson, before Mr. Knudsen got hurt?

Ans. Yes, sir.

Q. Did you ever hear the conversation between them, about splicing a wire?

123 Ans. Yes, sir.

Q. Tell the court what the conversation was.

Ans. One morning about ten or eleven o'clock, Mr. Benson called up and got Captain Roberts on the telephone and said, "I want you to come down to the office. I want to see you."

Q. Did he come down after that?

Ans. I went to dinner and when I came back, fifteen or twenty minutes after half past one, Captain Roberts came in, and Mr. Benson and Captain Roberts talked about splicing this wire.

Q. Was anybody else present besides them?

Ans. I think Mr. Herring was in the office.

Q. What was the conversation?

Ans. Captain Roberts tried to talk Mr. Benson in to splicing this wire.

Q. What did Captain Benson say to him about the wire having been cut? Was he saying that Roberts was responsible for it?

Ans. He said, "Cap., what are you going to do about my wire."

Q. What did Captain Roberts reply?

Ans. Captain Roberts said, "you can splice that wire and it will be just as good spliced as it was before it was cut."

Q. Did they discuss the splicing of the wire, then?

Ans. Yes, sir; and Mr. Benson told him Mr. Horace Becker, the agent for the L. & N. told him not to have the wire spliced, and Mr. Herring, also, said that the wire had a tendency to pull out or buckle up in those little levers.

Q. What did Captain Roberts say about splicing the wire?

Ans. Captain Roberts told him, "I have a wire spliced on my boat that has been spliced five years and has given perfect satisfaction."

Q. What did Roberts say he would do about it?

Ans. He said, "I will get the wire spliced, and I will get the Jamaican negro on the wharf there, to splice this wire."

124 Q. That is all the conversation?

Ans. That is all I remember.

Q. Do you remember whether they had any conversation after that about splicing this wire?

Ans. No, sir; I don't remember.

Q. That is the only conversation you know of?

Ans. Yes, sir.

The Court. Do you know whether that conversation took place before Mr. Knudsen was hurt, or not.

Ans. Yes, sir; it happened before the Fourth of July, on about a Friday.

Cross-examination:

Q. Will you explain, while you are clear that it happened—was there anything at the time to call that conversation to your attention; anything at that time to impress it on your memory?

Ans. Nothing, other than Mr. Benson had put it up to Captain Roberts to have this wire spliced.

Q. That was about two years ago?

Ans. It was before the Fourth of July. It was on a Friday, the conversation I am talking about.

Q. Can you explain just how you are able to fix it; what was the thing about the conversation that fixes it in your memory so clearly as being before the 4th of July?

Ans. Because the 4th of July is when he was supposed to have been hurt.

Q. Did you know he was hurt, then?

Ans. No, sir; it was three or four days after that.

Q. Where were you on the Fourth?

Ans. On the Fourth I guess I was at home, or maybe at the park.

Q. Do I understand that you are testifying that this conversation was had on a Friday before the Fourth?

Ans. About on a Friday. It wasn't on a Saturday, because I never work after one o'clock on Saturday.

125 Q. When was it that the question of that conversation between Captain Roberts and Mr. Benson was ever brought to your attention? Have you talked about it to anybody at all?

Ans. No; I haven't talked about it.

Q. In other words, there has been no discussion by you with anybody in regard to that conversation, up until to-day, is that right?

Ans. Nobody has talked to me about splicing the wire.

Q. I am speaking about the conversation between Captain Roberts and Mr. Benson. Have you discussed that with anybody at all, since the time of that conversation before to-day?

The Court. Has Mr. Benson talked to you or the lawyer talked to you?

Ans. Mr. Kilborn asked me what I knew about it.

Q. When was that? The last two or three days?

Ans. Yes sir. I was in Mr. Kilborn's once two or three days ago.

Q. Did the question of what took place in that conversation between Mr. Benson and Mr. Roberts—had that ever come up before?

Ans. No sir, I wasn't in this at all.

Q. What impressed it on your mind that that conversation was had before July the 4th—were you employed by Benson before the fourth?

Ans. I was with Mr. Benson since July, 1921.

Q. Continuously?

Ans. Yes sir.

Q. What is it that fixes it so clearly in your mind?
Ans. I told you—Joe was hurt on the 4th of July.
Q. Was anything said, at that time, about Captain Joe splicing it?
Ans. I never heard that conversation at all. Captain Roberts told Mr. Benson that he would have a Jamaican negro to splice this wire.
126 Q. Mr. Knudsen's name wasn't mentioned in connection with it at all?
Ans. I didn't hear it.
Q. Was there anything particular to call your attention to that conversation then, more so than any other conversation?
Ans. Sure, because several people advised him not to have it spliced.
Q. Did you hear the conversation between Mr. Benson and Mr. Becker about it?
Ans. Yes sir.
Q. And anybody else?
Ans. Yes sir, Mr. Herring.
Q. When was that?
Ans. On a Friday or Thursday before he got hurt.
Q. It all happened about the same time?
Ans. Yes sir, practically the same time.
(The witness was thereupon excused.)

V. E. HERRING, a witness called on behalf of the complainant, after having been first duly sworn, testified as follows:

Direct examination by Mr. KNUDSEN:

Q. What is your business?
Ans. Machinery.
Q. Where is your place of business?
Ans. New Orleans.
Q. Are you engaged in the buying and selling of machinery?
Ans. Yes sir—usually plants, and then I list other machinery on a commission.
Q. Do you know Mr. Charlie Benson?
Ans. Yes sir.
127 Q. Do you know Captain Beauregard Roberts?
Ans. Yes, sir.
Q. Were you ever in Mobile on any business of your own, in June or July 1927?
Ans. Yes sir.
Q. What was that business?
Ans. I made an appraisal of the Southern dry dock in the latter part of June, right after the 15th of June, and appraised the machinery, buildings and property, and on the 12th of July we sold it at auction.

Q. While you were over here, were you at the shop of Mr. Benson, on an occasion of any conversation between Mr. Benson and Captain Roberts, about the splicing of a cable that had been cut?

Ans. Yes, sir; several times.

Q. Tell the court your recollection of that conversation.

Ans. Well, on one occasion, I went down to get Mr. Charlie. We used to go down and go to dinner every night and I had my car and drove down to the shop and I was waiting for Mr. Roberts to come down, and we were there on the shop floor and Mr. Roberts came and he said, "Mr. Roberts, when are you going to get that cable spliced for me—I need that derrick bad. I had it rented," and Mr. Roberts said, "I am going to have it spliced for you right away—there is a Jamaican that makes mats, here on the wharf that said he would do the work, and I am going to take it over there and get it spliced," and Mr. Charlie asked me what I thought about splicing the cable, and I told him I didn't like it, and Mr. Roberts told him, "that is all right, Charlie, a spliced cable will hold; I had them spliced on my derrick boat and used cable, and they never come apart."

Do you recall whether this conversation was before or after July the 4th?

Ans. It was before.

128 Cross-examination by Mr. GRESHAM:

Q. What was the date of the conversation?

Ans. It was some time the latter part of June. I could not tell you the date. I went down there every day of the world, after I came from the Southern dock, and we would go to dinner together.

Q. The latter part of June?

Ans. Yes, sir; it was before the sale.

Q. What day was the sale?

Ans. The 12th of July.

Q. What is it that fixes it in your mind as being in June?

Ans. Because it was when I came over to appraise the yard, and before I got it ready for the sale, and I am positive of that.

Q. When were you first asked if you remembered that conversation?

Ans. Oh, some time ago.

Q. How long ago?

Ans. When this suit was first filed against Mr. Benson.

Q. You didn't testify at the hearing before Mr. Crowell, here, did you?

Ans. No sir.

Q. Was there anything in particular, to call your attention to that conversation?

Ans. Yes, sir; Mr. Benson asked me if I remembered any time down there when Mr. Roberts was down there.

Q. Then you started remembering for Mr. Benson?

Ans. No, sir; I told him about several conversations. Mr. Roberts was there several times.

Q. Did you hear Mr. Knudsen's name mentioned in reference to the splicing?

Ans. No, sir—yes, sir; I did. He asked him— well, not Knudsen— but he said "Joe," and Mr. Benson said, "I thought you said
129 you were going to get Joe to splice it," and Mr. Roberts said, "Joe is off digging treasure and I can not get hold of him."

Redirect examination by Mr. KILBORN:

Q. He said he was off digging treasure?

Ans. Yes, sir; he said he was off digging treasure and I cannot get hold of him.

Q. Mr. Knudsen is a diver and really does dig for treasure sometimes?

Ans. I never saw Mr. Knudsen.

(The witness was thereupon excused.)

WILLIAM HARRISON, a witness called in behalf of the complainant, after having been first duly sworn, testified as follows:

Direct examination by Mr. KILBORN:

Q. Are you a member of the firm of Harrison Brothers that runs a ship ways?

Ans. Yes, sir.

Q. You know Mr. Charlie Benson?

Ans. Yes, sir.

Q. How long have you known him?

Ans. All my life, since I was six or seven years old.

Q. Do you remember the occasion when Mr. Benson's derrick barge, "Chickasaw," came down to the Southern dry dock split there?

Ans. I know about the time.

Q. Did you, or your firm, at that time, have some boat on your ways that you wanted to get lifted?

Ans. We had the "Elizabeth O," that had burned.

Q. Did you make any arrangements with that derrick barge?

130 Ans. I rang up Benson's office.

Q. Who did you make the arrangements with?

Ans. I think with Mr. Benson's bookkeeper, and Mr. Benson, too. I think she got him to the phone.

Q. Miss Albertine?

Ans. Yes, sir; I rang her up and she got Mr. Benson.

Q. When did you do that; before or after the boat got down to the Southern?

Ans. After it was at the Southern.

Q. After Mr. Benson's boat was at the Southern?

Ans. Yes, sir.

Q. Do you remember how long it had been there?

Ans. Two or three days.

Q. You saw it there?

Ans. Yes, sir; I saw it there before it moved down to my place.

Q. You saw it before it moved to your place?

Ans. Yes, sir.

Q. And it was then that you made up your mind to get it for your purpose?

Ans. Yes, sir.

Q. Did you see Joe Knudsen across the river and talk to him about it?

Ans. No, sir.

(There was no cross-examination of this witness, and the witness was thereupon excused.)

CHARLES BENSON, recalled as a witness in his own behalf, after having been first duly sworn, testified further, as follows:

Direct examination by Mr. KILBORN:

Q. Mr. Benson, at the time you let Joe Knudsen go, on June the 11th, did you have any conversation with him about his coming back to splice that wire?

181 Ans. No, sir; I would not have had him back under any circumstances.

Q. Did you ever, at any time, have any conversation with him, that he was to come back at some later date to splice the wire?

Ans. No, sir.

Q. You heard Mr. Knudsen's testimony here about a phone conversation that he claims to have had with you shortly before he went to splice the wire, did you?

Ans. No, sir; I never heard the sound of his voice from the day I fired him until I was up in the court before Mr. Crowell, or seen him.

Q. You never saw him or heard from him from June the 11th up to the time you were in the trial before Judge Crowell?

Ans. No, sir; I never did.

Cross-examination by Mr. GRESHAM:

Q. You haven't any feeling towards Mr. Knudsen, have you?

Ans. I do; yes, sir. He has caused me a good deal of expense and worry.

Q. Over this suit?

Ans. Yes, sir.

Q. You have no friendly feelings towards him?

Ans. No, sir; none in the world.

Q. In fact, you dislike him very much?

Ans. I dislike him very much.

Redirect examination by Mr. KILBORN:

Q. You feel that he has brought a very unjust suit against you?

Ans. Yes, sir.

Q. And in violation of your standing friendship he has sued you?

132 Ans. Yes, sir; him and Captain Roberts has framed this suit up on me.

(The witness was thereupon excused.)

J. B. KNUDSEN was recalled by the defendant and testified further, as follows:

Direct examination by Mr. GRESHAM:

Q. Have you seen this derrick barge lately?

Ans. Yes, sir.

Q. How is she rigged?

Ans. The same way as I had her rigged. They are using her at the Alabama dry dock, and the operator told me he has lifted as much as forty tons and she is rigged the same way that I had her rigged and with the same blocks that I had her rigged up with.

(The witness was thereupon excused.)

(Both the complainant and the respondent thereupon rested.)

[File endorsement omitted.]

133 *Record of proceedings before Deputy Commissioner Crowell which was offered in evidence on July 3rd, 1929, at hearing of cause before Honorable Robert T. Ervin, judge*

United States Employees' Compensation Commission, seventh compensation district. In the matter of the claim for compensation under the longshoremen's and harbor workers' compensation act. J. B. Knudsen, claimant, against Charles Benson and/or Benson Sheet Iron & Metal Works, employer. Compensation order. Award of compensation. Case No. 93-1.

Such investigation in respect to the above entitled claim having been made as is considered necessary, and a hearing having been held in conformity with law, the deputy commissioner makes the following:

FINDINGS OF FACT

That on the 4th day of July, 1927, the claimant above named was in the employ of the employer above named, in Mobile County, in the State of Alabama, in the seventh compensation district, established under the provisions of the longshoremen's and har-

134 bor worker's compensation act; that at said time the employer had not secured the payment of compensation under said act; that on said day claimant herein, while performing service for the employer upon the navigable waters of the United States sustained personal injury resulting in his disability while he was employed as a rigger preparing to splice a wire fall on a vessel while said vessel was floating upon said waters, the fall broke loose, striking

him, and knocking him down and dragging him with his right lower extremity caught, resulting in partially ankylosed right knee, fracture of right femur with posterior displacement, with 1¾ inch shortening of said extremity.

That the employer had notice and knowledge of said injury as provided by said act.

That the medical, surgical, and hospital treatment required in the attempt to completely cure and relieve the claimant from effects of said injury was furnished by the marine hospital at Mobile, Alabama, for which treatment said hospital is going to make no charge.

That the average annual earnings of the claimant at the time of said injury amounted to the sum of $1500.00.

That as a result of said injury the claimant sustained temporary total disability from July 4, 1927, to November 22, 1928, both dates inclusive, covering a period of 72 4/7s weeks, and he is entitled to 72 4/7s weeks compensation for such disability at the rate of $19.23 a week.

That as a result of said injury claimant has a permanent partial disability consisting of 65% (sixty-five per cent) loss of use of his right leg.

That the difference between 40 weeks and said 72 4/7s weeks is 32 4/7s weeks, which when added to 288 weeks makes 320 4/7s; that 72 4/7s weeks deducted from 320 4/7s weeks equals 248 weeks, and 65% of 248 weeks equals 161.2 weeks, and the claimant is entitled to 161.2 weeks compensation for such permanent partial disability at the rate of $19.23 a week.

That Attorneys Pillans, Cowley and Gresham, the claimant's attorneys, have rendered legal services to said claimant and the reasonable value of such services is the sum of $630.00 which is approved by the deputy commissioner in said sum; that said attorneys are entitled to a lien upon award for compensation in said sum of $630.00.

Upon the foregoing facts the deputy commissioner makes the following:

AWARD

That the employer, Charles Benson, and/or Benson Sheet Iron & Metal Works, shall pay to the claimant J. B. Knudsen compensation as follows:

The sum of $19.23 a week beginning July 4, 1927, for 233-27/35 consecutive weeks, less $630.00 payable direct to Attorneys Pillans, Cowley & Gresham.

Given under my hand at New Orleans, Louisiana, this 20th day of December, 1928.

LETUS N. CROWELL,
Deputy Commissioner, Seventh Compensation District.

LNC:mt

PROOF OF SERVICE

I hereby certify that a copy of the foregoing compensation order was sent by registered mail to the claimant and the employer at the last known address of each as follows:

J. B. Knudsen: U. S. Marine Hospital, Mobile, Alabama.

Charles Benson, and/or Benson Sheet Iron & Metal Works: 1101 Savannah St., Mobile, Alabama.

LETUS N. CROWELL,
Deputy Commissioner.

Mailed December 26, 1928.

136 Penalty for private use to avoid payment of postage, $300.

Postmark of delivering office and date of delivery: Mobile, Ala., Dec. 27, 1928, 3 p. m.

Post Office Department—official business. Registered article No. 27068. Insured parcel No. —.

Return to U. S. Empl. Comp. Comm. Street and number, or post office box: 307 Customhouse Bldg., New Orleans, Louisiana.

RETURN RECEIPT

Received from the postmaster the registered or insured article the original number of which appears on the face of this card.

(Signature of name of addressee:) J. B. KNUDSEN.

(Signature of addressee's agent:) M. D. CLARKE.

Date of delivery, 12-27, 1928. Form 3811.

Penalty for private use to avoid payment of postage, $300.

Postmark of delivering office and date of delivery: Mobile, Ala. Dec. 28, 1928, 1 p. m.

137 Post Office Department—official business. Registered article No. 27069. Insured parcel No. —.

Return to: (Name of sender) U. S. Emp. Comp. Comm. Street and number, or post office box: 307 Customhouse Bldg., New Orleans, Louisiana.

RETURN RECEIPT

Received from the postmaster the registered or insured article, the original number of which appears on the face of this card.

(Signature or name of addressee:) CHARLES BENSON,

(Signature of addressee's agent:) MRS. D. P. HOWELL.

Date of delivery, 12/27, 1928. Form 3811.

Postmark of mailing office: New Orleans (Customhouse Sta.), La., Dec. 26, 1928.

Receipt for registered article No. 27068. Registered at the post office indicated in postmark. Fee paid 15 cents. Class postage —. Return receipt fee —. Spl. Del'y fee —. Delivery restricted to addressee in person, or order. Accepting employee will place his initials in space indicating restricted delivery.

Postmaster per ———.

Return receipt requested, fee paid.

Complete record of registered mail is kept at the post office, but the sender should write the name of the addressee on back hereof as an identification. Preserve and submit this receipt in case of inquiry or application for indemnity.

Registry fees and indemnity.—Domestic letters and sealed parcels indemnified for $50 or less, 15 cents; for over $50 and not in excess of $100, 20 cents; domestic second-class, not indemnified, 15 cents; domestic third-class, indemnified up to $25, 15 cents; Postal Union articles addressed to foreign countries, regardless of class or indemnity, 15 cents. Consult postmaster as to registry fees chargeable on registered international parcel-post packages for foreign countries. Claims must be filed with postmasters within one year from date of mailing.

Form 3806 (Rev. 6-29-27).

Postmark of mailing office: New Orleans (Customhouse Sta.), La., Dec. 26, 1928.

Receipt for registered article No. 27069. Registered at the post office indicated in postmark. Fee paid 15 cents. Class postage —. Return receipt fee —. Spl. Del'y fee —. Delivery restricted to addressee in person, or order.

Accepting employee will place his initials in space indicating restricted delivery.

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Return receipt requested, fee paid.

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Form 3806 (Rev. 6-29-27). Filed Dec. 26, 1928.

LEROY N. CROWELL,
Deputy Commissioner.

Treasury Department, United States Public Health Service, Office of Medical Officer in Charge

EXTRACT FROM CLINICAL RECORD

Name, Joseph Knudsen. Occupation, 1st mate. Age, 62 years. Last vessel, derrick-barge "Chickasaw." Furnished hospital care

[illegible] July 4, 1927, to May 15, 1928. Continues in hospital. Passed outpatient care from ——, 192—, to ——, 192—. Diagnosis: Fracture, femur, right, supra-condylar, with posterior displacement and a vertical intro-condylar fracture also.

HISTORY OF ILLNESS OR ACCIDENT AS ELICITED FROM PATIENT

Patient states that on July 4th, 1927, while employed on the derrick-barge "Chickasaw," he was struck by a piece of pulley when a line pulled loose. The right leg was twisted to one side, followed by severe pain and swelling in the right knee. Completely disabled.

140

CONDITION OF PATIENT UPON ADMISSION

Admitted by ambulance suffering considerable pain and severe shock, with deformity of right knee from fracture lower end of femur.

DIGEST OF TREATMENT GIVEN

7/4, on admission: Opium and hot water bags for pain. X-ray examination and fixation of right knee with sand bags.

7/8: Operation, general anesthetic: Skin incision to bone. Steinman pin inserted through condyles and leg placed under traction under suspension in Balkan frame.

8/9: Operation: Removal of Steinman pin, plaster dressing applied.

8/27: Plaster dressing removed. X ray taken.

10/27: General anesthetic, operation, split patella incision for removal bone-block.

11/5: Plaster dressing removed. Physiotherapy treatment begun.

3/24: Walking brace applied. Physiotherapy treatment continued.

CONDITION OF PATIENT

At present, undergoing treatment.

Continues slow general improvement. Up and about with assistance of crutches and knee-brace. Right knee ankylosed in semiflexed position, with permanent deformity and disability.

REMARKS

To include available data of previous service admissions, transfers, or discharge of patient

Present status, right knee: Moderate flexion, deformity of 165°. Almost complete ankylosis with only 20° motion. Circumference of knee larger than left knee.

142 Right leg: One and three-quarters inches shortening.
Disability: At present time there is total temporary disability. Permanent disability of about 65% expected.

[SEAL.] FRANCIS STURGIS,
Surgeon, U. S. P. H. S. in Charge.

(Station) U. S. Marine Hospital,
(Address) Mobile, Alabama.
May 16, 1928.

This form to be used for the convenience of firms or other interested persons, where the information has been authorized by the patient and the issue thereof authorized by the Surgeon General.
Form US-226 B

United States of America—United States Employees' Compensation Commission

In the matter of the claim for compensation under the longshoremen's and harbor workmen's compensation act. J. B. Knudsen, Claimant, against Charles Benson, Benson Sheet Iron & Metal Works, Employer. Case No. 93–1. Notice of Hearing.

To CHARLES BENSON,
Northwest Water and Palmetto Streets, Mobile, Ala.

142 You are hereby notified that upon application made by claimant, an interested party in the above-entitled claim, a hearing on such claim is hereby ordered, to be held before Letus N. Crowell, deputy commissioner, 7th compensation district of the United States Employees' Compensation Commission, at U. S. court room, Federal Court House Bldg., in the city of Mobile, Alabama, on the 20th day of November, 1928, at 9 o'clock a. m. of that day.

In testimony whereof, the undersigned, a deputy commissioner of the United States Employees' Compensation Commission, has hereunto set his hand at New Orleans, La., this 24th day of October, 1928.

LETUS N. CROWELL,
Deputy Commissioner, 7th Compensation District.

RETURN OF SERVICE

I certify that a duplicate/original of the within notice of hearing was (strike out method not applicable) sent by registered mail to the person named herein on October 24, 1928.

M. I. TOLLEY,
Clerk-Stenographer.

Penalty for private use to avoid payment of postage, $300.
Postmark of delivering office and date of delivery: Mobile, Ala., Oct. 25, 1928, 7 p. m.

Post Office Department—official business. Registered article No. 25984. Insured parcel No. —. Return to U. S. Employees Com. Com. Street and number, or post-office box, 307 Cus. House St., New Orleans, Louisiana.

RETURN RECEIPT

Received from the postmaster the registered or insured article, the original number of which appears on the face of this card.

(Signature or name of addressee:) CHAS. BENSON. (Signature of addressee's agent:) ——— ———.

Date of delivery, Oct. 26, 1928. Form 3811.

Postmark of mailing office: New Orleans (Customhouse Sta.), La., register, Oct. 25, 1928.

Receipt for registered article No. 25984. Registered at the post office indicated in postmark. Fee paid, 15 cents. Class postage, —. Return receipt fee, —. Spl. del'y fee, —. Delivery restricted to addressee in person or order.

Accepting employee will place his initials in space indicating restricted delivery.

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144 Registry fees and indemnity.—Domestic letters and sealed parcels indemnified for $50 or less, 15 cents; for over $50 and not in excess of $100, 20 cents; domestic second class, not indemnified, 15 cents; domestic third class, indemnified up to $25, 15 cents; Postal Union articles addressed to foreign countries, regardless of class or indemnity, 15 cents. Consult postmaster as to registry fees chargeable on registered international parcel-post packages for foreign countries. Claims must be filed with postmasters within one year from date of mailing. Form 3806 (Rev. 6-29-27.)

Form US-226 B.

United States of America—United States Employees' Compensation Commission

In the matter of the claim for compensation under the longshoremen's and harbor workers' compensation act. J. B. Knudsen, claimant, against Charles Benson, Benson Sheet Iron & Metal Works, employer. Notice of hearing. Case No. 93-1.

To Attorney VINCENT P. KILEORN,

First National Bank Bldg., Mobile, Alabama.

You are hereby notified that upon application made by 145 claimant, an interested party in the above-entitled claim, a hearing on such claim is hereby ordered, to be held before

Letus N. Crowell, deputy commissioner 7th compensation district of the United States Employees' Compensation Commission, at U. S. Court Room, Federal Court House Bldg., in the city of Mobile, Alabama, on the 20th day of November, 1928, at 9 o'clock a. m. of that day.

In testimony whereof, the undersigned, a deputy commissioner of the United States Employees' Compensation Commission, has hereunto set his hand at New Orleans, La., this 24th day of October, 1928.

LETUS N. CROWELL,
Deputy Commissioner 7th Compensation District.

RETURN OF SERVICE

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M. I. TOLLEY,
Clerk-Stenographer.

Penalty for private use to avoid payment of postage, $300.

Postmark of delivering office and date of delivery: ———, Ala., Oct. 25, 1928, 1.30 p. m.

Post Office Department—official business. Registered article No. 25985. Insured parcel No. —.

Return to: U. S. Employees Comp. Com. Street and number, or post office box, 307 Cus. Hs. Bl., New Orleans, Louisiana.

RETURN RECEIPT

Received from the postmaster the registered or insured article, the original number of which appears on the face of this card.

(Signature or name of addressee:) VINCENT F. KILBORN.

(Signature of addressee's agent:) ———.

Date of delivery, Oct. 25, 1928. Form 3811.

Postmark of mailing office: New Orleans (Custom-House Sta.) La. Registered Oct. 24, 1928.

Receipt for registered article No. 25985. Registered at the post office indicated in postmark. Fee paid, 11 cents. Class postage, —. Return receipt fee, —. Spl del'y fee, —. Delivery restricted to addressee in person or order.

Accepting employee will place his initials in space indicating restricted delivery.

Postmaster, per ———.

Return receipt requested, fee paid.

Complete record of registered mail is kept at the post office, but the sender should write the name of the addressee on back hereof as an identification. Preserve and submit this receipt in case of inquiry or application for indemnity.

Registry fees and indemnity.—Domestic letters and mailed parcels indemnified for $50 or less, 15 cents; for over $50 and not in excess of $100, 20 cents; domestic second-class, not indemnified, 15 cents; domestic third-class, indemnified up to $25, 15 cents; Postal Union articles addressed to foreign countries, regardless of class or indemnity, 15 cents. Consult postmaster as to registry fees chargeable on registered international parcel-post packages for foreign countries. Claims must be filed with postmasters within one year from date of mailing. Form 3806 (Rev. 6-29-27)
Form US-226 B.

United States of America—United States Employees' Compensation Commission

In the matter of the claim for compensation under the longshoremen's and harbor workers' compensation act. J. B. Knudsen, Claimant, against Charles Benson, Benson Sheet Iron & Metal Works, Employer.

Notice of hearing. Case No. 93-1

To J. B. KNUDSEN,
U. S. Marine Hospital,
Mobile, Alabama:

You are hereby notified that upon application made by yourself, an interested party in the above-entitled claim, a hearing on
148 such claim is hereby ordered, to be held before Letus N. Crowell, deputy commissioner 7th compensation district of the United States Employees' Compensation Commission, at U. S. Court Room, Federal Courthouse Bldg. in the city of Mobile, Alabama, on the 20th day of November, 1928, at 9 o'clock a. m. of that day.

In testimony whereof, the undersigned, a deputy commissioner of the United States Employees' Compensation Commission, has hereunto set his hand at New Orleans, La. this 24th day of October, 1928.

LETUS N. CROWELL,
Deputy Commissioner, 7th Compensation District.

RETURN OF SERVICE

I certify that a duplicate/original of the within notice of hearing was (strike out method not applicable) sent by registered mail to the person named herein on October 24, 1928.

M. I. TOLLEY,
Clerk-Stenographer.

Penalty for private use to avoid payment of postage, $300. Postmark of delivering office and date of delivery.
Post Office Department—official business. Registered article No. 25068. Insured Parcel No.
Return to U. S. Employees' Comp. Com. Street and number, or post office box: 307 Cus. Hse. Bl., New Orleans, Louisiana.

RETURN RECEIPT

Received from the postmaster the registered or insured article, the original number of which appears on the fact of this card.

(Signature or name of addressee:) J. B. KNUDSEN.

(Signature or addressee's agent:): M. D. CLARKE,

Date of delivery, 10-25, 1928. Form 3811.

Postmark of mailing office: New Orleans, Custom House Sta., La., Oct. 24, 1928.

Receipt for registered article No. 25983. Registered at the post office indicated in postmark. Fee paid, 11 cents. Class postage, —. Return receipt fee. Spl. del'y fee, —. Delivery restricted to addressee in person or order.

Accepting employee will place his initials in space indicating restricted delivery.

Postmaster, per —.

Return receipt requested, fee paid.

Complete record of registered mail is kept at the post office, but the sender should write the name of the addressee on back hereof as an identification. Preserve and submit this receipt in case of inquiry or application for indemnity.

Registry fees and indemnity.—Domestic letters and sealed parcels indemnified for $50 or less, 15 cents; for over $50 and not in excess of $100, 20 cents; domestic second-class, not indemnified, 15 cents; domestic third-class, indemnified up to $25, 15 cents; Postal
150 Union articles addressed to foreign countries, regardless of class or indemnity, 15 cents. Consult postmaster as to registry fees chargeable on registered international parcel-post packages for foreign countries. Claims must be filed with postmasters within one year from date of mailing. Form 3806 (Rev. 6-29-27).

Form US-226 B.

United States of America—United States Employees' Compensation Commission

In the matter of the claim for compensation under the longshoremen's and harbor workers' compensation act. J. B. Knudsen, claimant, against Charles Benson, Benson Sheet Iron & Metal Works, employer. Notice of hearing. Case No. 93-1.

To PILLANS, COWLEY & GRESHAM,

Van Antwerp Bldg.,

Mobile, Alabama.

You are hereby notified that upon application made by claimant, an interested party in the above-entitled claim, a hearing on such claim is hereby ordered, to be held before Letus N. Crowell, deputy commissioner, 7th compensation district of the United States Employees Compensation Commission, at U. S. Court Room, Fed-
151 eral courthouse bldg., in the city of Mobile, Alabama, on the 20th day of November, 1928, at 9 o'clock a. m. of that day.

In testimony whereof, the undersigned, a deputy commissioner of the United States Employees' Compensation Commission, has hereunto set his hand at New Orleans, La., this 24th day of October, 1928.

LETUS N. CROWELL,
Deputy Commissioner, 7th Compensation District.

RETURN OF SERVICE

I certify that a duplicate/original of the within notice of hearing was (strike out method not applicable) sent by registered mail to the person named herein on October 24, 1928.

M. I. TOLLEY,
Clerk-Stenographer.

Penalty for private use to avoid payment of postage, $300. Postmark of delivering office and date of delivery: Mobile, Ala., Oct. — 1928, 1.30 p. m.

Post Office Department—official business. Registered article No. 25982. Insured parcel No. —.

152 Return to U. S. Employees' Comp. Com., street and number, or post office box, 307 Cus. Hse. Bl., New Orleans, La.

RETURN RECEIPT

Received from the postmaster the registered or insured article, the original number of which appears on the face of this card.

(Signature of name of addressee):

PILLANS, COWLEY & GRESHAM.

Date of delivery, Oct. 25, 1928. Form 3811.

Postmark of mailing office: New Orleans (Custom House Sta.), La. Registered Oct. 24, 1928.

Receipt for registered article No. 25982. Registered at the post office indicated in postmark. Fee paid, 15 cents. Class postage, —. Return receipt fee, — Spl. del'y fee, —. Delivery restricted to addressee in person or order.

Accepting employee will place his initials in space indicating restricted delivery. Postmaster, per, ———. Return receipt requested, fee paid.

Complete record of registered mail is kept at the post office, but the sender should write the name of the addressee on back hereof as an identification. Preserve and submit this receipt in case of inquiry or application for indemnity.

Registry fees and indemnity.—Domestic letters and sealed parcels indemnified for $50 or less, 15 cents; for over $50 and not in excess of $100, 20 cents; domestic second-class, not indemnified, 15 cents; domestic third-class, indemnified up to $25, 15 cents; Postal Union articles addressed to foreign countries, regardless of class or indemnity, 15 cents. Consult postmaster as to registry fees chargeable on registered international parcel-post packages for

foreign countries. Claims must be filed with postmasters within one year from date of mailing. Form 3806 (Rev. 6-29-27.)

Form US-215.

Leave this space blank.

Case no. 33-1. Insurance. Carrier's No. —.

United States Employees' Compensation Commission, Office of Deputy Commisioner Letus N. Crowell, Administering Longshoremen's and Harbor Workers' Compensation Act

ANSWER OF EMPLOYER OR INSURANCE CARRIER TO EMPLOYEE'S CLAIM FOR COMPENSATION

J. B. KNUDSEN, CLAIMANT

vs.

CHARLES BENSON, BENSON SHEET IRON & METAL WORKS, EMPLOYER

The employer above named for answer to the claim respectfully shows:

154 1. It is admitted that applicant sustained an injury on or about the date set forth in the application.

2. It is denied that both the employer and employee were subject to the longshoremen's and harbor workers' compensation act at the time of the alleged injury.

3. It is denied that the relationship of employer and employee existed at the time of the injury.

4. It is denied that at the time of the alleged injury the employee was performing service growing out of and incidental to his employment.

5. It is admitted that notice of injury was given employer as specified in application.

6. It is denied that applicant was permanently disabled to the extent stated in application.

7. It is admitted that applicant was temporarily disabled for the period stated in application.

8. It is denied that the rate of wages as set forth in application is correct.

9. It is denied that at the time claimant received the injury in question he stood in such relationship to the undersigned as to render the undersigned liable for compensation under the longshoremen's and harbor workers' compensation act.

(Signed) CHAS. BENSON,
Benson Sheet Iron & Metal Works.

NOTE.—The employer or insurance carrier should answer the claim within ten days from the date that a copy of it is served upon him. The original answer should be mailed to the deputy commissioner at the above address and a copy thereof served upon the

claimant either personally or by mailing to the address in the claim.

Received June 11, 1928. District No. 7.
155 Form US–203.
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Case No. 93–1. Insurance. Carrier's No. —.

United States Employees' Compensation Commission, office of deputy commissioner administering longshoremen's and harbor workers' compensation act

EMPLOYEES' CLAIM FOR COMPENSATION

(To be filed with the deputy commissioner in accordance with sections 13 and 19 of the law)

Injured person:

1. Name of employee: J. B. Knudsen; employee's check No. —.
2. Address: Street and No.: U. S. marine hospital. City or town: Mobile.
3. Sex, male; age, 55; married, single, widowed—single.
4. Do you speak English? Yes. Nationality, Norwegian.
5. State regular occupation: Rigger, ship construction, diver.
6. What were you doing when injured? Preparing to splice fall.
7. (*a*) Wages or average earnings per day, $5.00 (include overtime, board, rent, and other allowances.) (*b*) Per week, $30.00. (*c*) Were you employed elsewhere during week in which you were injured? No. (*d*) If so, state where and when: ———.
8. Were you paid full wages for day of accident? Nothing.

156 Employer:

9. Employer: Charles Benson, Benson Sheet Iron & Metal Works.
10. Office address: Street and No.: NW. Water & Palmetto. City or town: Mobile.
11. Nature of business: Barge owner, ship repair.

The injury:

12. Place where injury occurred: Derrick barge "Chickasaw," Pinto Island, Mobile Co.
13. Name of foreman: ———.
14. Date of accident or first illness: The 4th day of July, 1927, at about 10 o'clock a. m.
15. How did accident happen or how was occupational disease caused? Was struck and knocked down on barge when tackle, made fast to wharf, let go, upon part of wharf to which tackle was fastened breaking loose.

Nature and extent of injury:

16. State fully nature of injury or occupational disease: Fracture right femur, super condylar with posterior displacement and vertical intra condylar fracture also.

17. On what date did you stop work because of injury? July 4, 1927.

18. Have you retured to work (yes or no)? No. If "yes," on what date? ———, 192—.

19. Does injury keep you from work (yes or no)? Yes.

20. Have you done any work in period of disability? No.

21. Have you received any wages since injury? No. If so, from and to what date? ———.

22. Has injury resulted in amputation? No. If so, describe same:———

157 23. Did you request your employer to provide medical attendance? Don't know. Was completely disabled by injury. Has he done so? No.

24. Attending physician: Name, U. S. marine hospital. Address, Mobile.

25. Hospital: Name——— Address———

Notice:

26. Have you given your employer notice of injury (yes or no)? Yes; by B. Roberts. When? July 4, 1927, and May 29, 1928.

27. If such notice was given, to whom? Charles Benson, Benson Sheet Iron & Metal Wks.

28. Was it given orally or in writing? First notice oral, second in writing.

I hereby present my claim to the deputy commissioner for compensation for disability resulting from an injury arising out of and in the course of my employment and not occasioned solely by intoxication, or by my willful intention, and in support of it I make the foregoing statement of facts.

(Signed by) J. B. KNUDSEN,
Claimant.

Mail address, U. S. Marine Hospital, Mobile, Ala.
Dated May 29, 1928.
Received: May 31, 1928. District No. 7.
158 Form US–201.
Leave this space blank.
Case No. 93–1. Insurance. Carrier's No. —.

United States Employees' Compensation Commission, office of deputy commissioner administering longshoremen's and harbor workers' compensation act

EMPLOYEE'S NOTICE TO EMPLOYER OF ACCIDENT

To preserve his rights under the law this notice must be filled out and signed by the employee or by someone for him, and delivered or mailed to the employer within 30 days after accident or occupational disease.

1. Employer: Charles Benson, Benson Sheet Iron & Metal Works. Address: Mobile.

2. I hereby give notice, as required by law, that I was injured on July 4, 1927. Monday about 10 a. m.

3. The injury occurred at Pinto Island, barge "Chickasaw."

4. My injury was caused by being struck and knocked down when tackle made fast to wharf let go, upon part of the wharf to which tackle was fastened breaking loose.

5. The nature and extent of my injury is fracture of right femur, supra condylar, with posterior displacement and vertical intra condylar fracture also.

6. I am now at U. S. marine hospital.

7. I am being attended by surgeon in charge, and I here-
159 with request that you provide me with such medical, surgical, or other attendance or treatment, nurse, and hospital service, medicines, crutches, and apparatus as may be required.

8. Employee's check number —.

Date of this notice: May 29, 1928.

(Sign here)

J. B. KNUDSEN.

Address to which mail should be sent: U. S. Marine Hospital.

Received May 31, 1928. District No. 7.

Form US–201.

Leave this space blank.

Case No. 93–1. Insurance. Carrier's No. —.

United States Employees' Compensation Commission, office of deputy commissioner administering longshoremen's and harbor workers' compensation act

EMPLOYEE'S NOTICE TO DEPUTY COMMISSIONER OF ACCIDENT

To preserve his rights under the law, this notice must be filled out and signed by the employee or by someone for him, and delivered or mailed to the deputy commissioner, United States Employees Compensation Commission, at the above address within 30 days after accident or occupational disease.

1. Full name of injured person: J. B. Knudsen. Employee's check No. —.

160 2. Address: U. S. Marine Hospital, Mobile, Alabama.

3. Name of employer: Charles Benson, Benson Sheet Iron & Metal Works.

4. Address: N. W. Water and Palmetto Streets, Mobile, Alabama.

5. Time of accident or first illness: July 4, 1927, Monday about 10 a. m.

6. Time of stopping work: Immediately upon being hurt.

7. Place where accident or injury occurred: Derrick barge "Chickasaw," Pinto Island, Mobile Co.

8. Nature and cause of accident, injuries or death, was occupational disease caused (describe fully)? Was struck and knocked down on barge when tackle, made fast to wharf, let go, upon part of the wharf to which tackle was fastened breaking lease.

9. Nature and extent of injury or disease: Fracture of right femur, supra condylar, with posterior displacement and vertical intracondylar fracture also.

10. Names and addresses of witnesses to accident or condition causing occupational disease: Capt. B. Roberts, 308 State Street, Mobile; Joel Lemmis, c/o tug "Sister," Mobile.

11. Did the employer or his superintendent or foreman have knowledge of the accident or occupational disease? Yes.

12. Name of such person: Notice given immediately to Chas. Benson by Capt. B. Roberts.

13. Did you request your employer to furnish medical service? Am unable to say because completely disabled by injury. Has he done so? No.

14. Name of attending physician: Surgeon in charge U. S. Marine Hospital. Address: Mobile. Date of this notice: May 29, 1918.

(Sign here) J. B. KRUDSEN.

Received May 31, 1918. District No. 7.

161 United States Employees' Compensation Commission, Before Hon. Lotus N. Crowell, Deputy Commissioner, 7th Compensation District.

J. B. KRUDSEN, CLAIMANT

vs.

CHARLES BENSON, BENSON SHEET IRON AND METAL WORKS, DEFENDANT

Case No. 93-1.

Transcript of testimony at hearing.

Pursuant to notice, this matter was heard before Lotus N. Crowell, deputy commissioner, United States Employees' Compensation Commission, at Mobile, Alabama, on the 22nd day of November, 1923.

APPEARANCES OF COUNSEL

Hon. Alexis T. Gresham and Hon. Palmer Pillans, Messrs. Pillans, Cowley and Gresham, attorneys for the claimant.

Hon. Vincent F. Kilborn, Messrs. Outlaw, Kilborn, and Smith, attorneys for the defendant.

11/26/23. Copy mailed to the Commission. L. N. C.

STIPULATION AS CERTAIN FACTS

It is hereby stipulated and agreed by and between the parties hereto, as follows:

First. That J. B. Knudsen, claimant, sustained injury on July the 4th, 1927.

Second. That Charles Benson, Benson Sheet Iron and Metal Works, had notice and knowledge of said injury as provided by the longshoremen and harbor workers' compensation act.

Mr. Gresham. In regard to Mr. Knudsen's injury, I have a certified copy of the record of the marine hospital at Mobile and I understand, under the practice, that is sufficient, and I did not make any arrangement to bring the physician of the marine hospital down here.

Note.—Mr. Gresham produced the certified copy of the record referred to.

Mr. Kilborn. We object to the introduction of the record as not being the best evidence, and as irrelevant, incompetent, and immaterial.

The Deputy Commissioner. The practice is here, that we allow medical reports to be put in evidence, but of course, you can not deprive the party of his right of cross-examination of any witness.

Mr. Kilborn. That report there would deny to us the right to cross-examination of the witness, and that is one of the theories upon which we object.

The Deputy Commissioner. In your answer here, it was admitted that the applicant was temporarily disabled for the period stated.

Mr. Kilborn. But, the extent of his disability and how long it would continue, we do not know.

Mr. Gresham. I would like you to examine this certified copy. It simply describes, from a medical standpoint, just what injury the claimant suffered, and gives the opinion of the surgeon in charge of the United States Public Health Service at Mobile, of the nature of the permanent disability. It is a certified copy of the record
168 of a governmental department of the United States, and I think is admissible as a certified copy of the record. Certainly, it is admissible in a proceeding of this kind, where the statute provides that the commissioner is not bound by the technical rules of the common law, and they are privileged to go outside the usual channel.

Mr. Kilborn. I should like to object.

The Deputy Commissioner. The objection is overruled, with the provision that the doctor is to be produced here, for the purpose of cross-examination. Is that the ground of your objection?

Mr. Kilborn. Yes, sir.

The Deputy Commissioner. Received in evidence, certified copy of the record of the hospital, over the objection of the defendant, and marked "Claimant's Exhibit 1," with the proviso, however, that the doctor is to be produced for cross-examination.

Mr. GRESHAM. May I ask your honor that a subpoena issue. It is very difficult to get the information at the marine hospital and I have no objection to producing the doctor, but the only trouble is the delay of getting him.

Mr. KILBORN. The chief basis of our contention here, is the absence of any liability, whatever, and we might defer any examination of the doctor until we get the testimony in as to whether there is any liability. Of course, if there is none the court would not want to hear the doctor, and if, when you get through, you are not ready to decide the case offhanded, we will be glad to go out and get the doctor's testimony.

The DEPUTY COMMISSIONER. All right, we will hold that matter in abeyance, and you can put on your other evidence.

Captain BEAUREGARD ROBERTS, a witness called by Mr. Gresham, after having been first duly sworn by the deputy commissioner, testified as follows:

164 The DEPUTY COMMISSIONER:

Q. State your name.

A. Beauregard Roberts.

Q. What is your address?

A. 303 State Street.

Q. Mobile, Alabama?

A. Yes, sir.

Examination by Mr. GRESHAM:

Q. What is your business?

A. I am in the tugboat business and towboat.

Q. You are a navigator in the harbors and rivers around Mobile?

A. Yes, sir.

Q. Do you know Captain Joe Knudsen, the claimant in this case, and Mr. Charles Benson, of the Benson Sheet Iron and Metal Works?

A. Yes, sir.

Q. You have known them for several years?

A. Yes, sir.

Q. Were you present at the time of Captain Knudsen's injury at Mobile, on July the 4th, 1927?

A. Yes, sir.

Q. Where did this injury take place?

A. Over at the Alabama Dry Docks.

Q. Where was Captain Knudsen when he was hurt?

A. He was on the derrick "Chickasaw."

Q. The derrick barge?

A. Yes, sir.

Q. Who owned the derrick barge "Chickasaw" at that time?

A. Mr. Benson.

Q. Mr. Charles Benson, of the Benson Sheet Iron and Metal Works?

A. Yes, sir.

Q. State to the court what you know of the circumstances, with reference to Captain Knudsen being on the barge at the time.

165 A. Well, I had towed the barge for Mr. Benson from Chickasaw down to the Southern docks and made her fast, and I went from there up the river and when I came back my wife said, "Mr. Benson wants to talk to you over the phone," and I rang him up and he told me that Captain Joe had cut the wire on his derrick and promised to splice it and he had a call for the derrick from the State docks and had her rented, but the wire was cut and he could not use it and he wanted to know where Joe was, and I asked my wife where Joe was and she said he had gone to Pascagoula and that he would be back the next day, and in that event, she wanted to go to Biloxi, sickness down there, and I wrote a note and put it on Joe's desk and I told her to tell him to come back here right away, Captain Benson wanted his cable spliced; he cut it and promised to splice it and I said, "I am going to Biloxi with my wife and I will be back here," and I think they wanted to have the derrick about the 5th of July—the Fourth was a holiday and they had to use her the next day. And I went to Biloxi and came back that night and he came up during the night but I didn't see him that night, and I got up the next morning and we got some breakfast and went down to the boat and he had some tools that he had left on my tug, and he said he wanted to get them and I asked him where they were and he told me and I said I will get them and you come on down and go to the boat and get things ready to splice the cable, and I said, I will lend a hand and I will get Mr. Floyd Lennis; and he went on across and I went to my boat and got the tools and Mr. Floyd, and we came and went over to where the derrick was, over at the Alabama docks and Captain Knudsen was there and said he wanted to swing the boom around to get it over the docks, so that he could splice it, and he picked up a line and made it fast from the bow of the derrick over onto a stringer that was on the wharf, and I made the remark at the time, that the stringer didn't look good to me, that he had better tie it to the piling and he said, "I will attend to this; you go

166 back to the stern and slack away, so I can heave her around"; and time I got back there, I heard somebody holler and his head was down on the deck and the line was turned around his leg and his leg was up in the air, and I got the man to slack down the block and that loosened the rope and took him off and got him in a boat and carried him over to this side and I rang up Mr. Benson and told him that Joe had been hurt and had his leg broke and I was going to try to get him in the hospital—that he had worked on my boat prior to that time and that he was entitled to go to the marine hospital, I thought, and I rang them up and they sent down a bus right away and they carried him out to the hospital.

Q. When was it you brought that barge down to Chickasaw?

A. Well, it must have been a day or day before that, because I had gone up the river, but I don't exactly remember the date; some-

where about the first of the month, or in that neighborhood; first of July.

Q. Did you move that barge, except to bring her down?

A. No, sir; I brought her down to the Southern dry docks and then I left her.

Q. Didn't you take her down to the Mobile and Gulf Navigation Company?

A. I did later on. When I came back, the boat was over at Henderson's docks.

Q. At Henderson's docks?

A. Not Henderson's docks; Harrison's docks.

Q. Do you know what she was doing at Harrison's docks?

A. I understood she was taking off a boat that was burned and had fell on the dock and they were raising her up with the derrick and taking her off.

Q. Who was on the barge over at Harrison's docks?

A. I think Captain Joe was on there, and I don't know who else was on her. I didn't go over there at all.

Q. How long was it, from the time you saw her over at Har-
167 rison's docks to the time you and Captain Knudsen went over to the derrick barge at the Alabama dry docks?

A. How long?

Q. Yes. What was the period of time?

A. Well, if I remember right, I don't think it was more than two or three days, or something of that kind.

Q. Now, when you brought her down from Chickasaw, where did you leave her?

A. I put her at the Southern docks.

Q. And the next time you saw her?

A. The next time I saw her she was at Harrison's docks.

Q. And the next time you saw her, where was she?

A. The next time I saw her she was back in the slip again, at the Southern docks.

Q. How did she get back in there do you know?

A. I don't know.

Q. And the next time you saw her, where was she?

A. The next time I saw her she was there, and I don't remember now where she went after that, but she must have moved away from there and come back there again into the Southern docks.

Q. Do you know what work was done with that derrick barge from the time you brought her from Chickasaw until you went with Captain Knudsen when he was hurt?

A. No more than I have stated here, that I was familiar with her moving about from one place to the other.

Q. Do you know whether she was doing any work?

A. Well, before he spliced that cable, he was in the slip at the Southern docks raising a small derrick of mine that was sunk there, that I had loaned him.

Mr. KILBORN. Loaned who?

168 A. Captain Knudsen. I don't know whether he loaned it to him or how he got it, but he had it there trying to raise this machine.

Examination continued by Mr. GRESHAM:

Q. How long had the derrick barge been at the Alabama before Captain Knudsen was hurt?

A. I don't know, sir.

Q. The place where the derrick barge was, at the time of Captain Knudsen's injury, was alongside the wharf at the plant of the Alabama Dry Dock and Shipbuilding Company?

A. Yes, sir.

Q. The barge was in the water?

A. Yes, sir.

Q. The navigable waters?

A. Yes, sir.

Q. Of Mobile River?

A. Yes, sir.

Q. Explain to his honor, as clearly as you can, just how that derrick barge was made; the construction of it; what it is and how it is rigged?

A. Well, she is just a square scow; a square barge, decked over and made very strong and very heavy for lifting purposes. She has got a very long boom on her and boilers and engine, and she has been used at times for dredging. They used her up at Chickasaw, during the war, for dredging. She had a dredge bucket.

Q. Has she a mast on her?

A. She hasn't got a mast. She has an A frame for hoisting this boom up and down. There is a short mast that works in a pivot in that A frame.

Q. How is the boom rigged?

A. The boom is rigged with wires and sheaves and blocks connecting to steam engines on the deck of the barge.

Q. Can you explain just how the boom is held in place and just how it is used?

169 A. This short mast is rigged on a turn table and that leads with wires to springers to swing the boom. The boom, itself, lifting the load, the wires go up and into blocks on the boom and into the sheaves that come down and lead to engines on the deck.

Q. How are the wire ropes used for lifting purposes, reaved?

A. They are rove through those sheaves and heavy blocks.

Q. How many blocks are there used for the purpose of lifting?

A. Well, on the main boom, I think there are either four or six sheave blocks; very large blocks, twenty-two or twenty-four inches in diameter.

Q. How many blocks?

A. Two of those on that boom and then there are sheaves leading from that down to the drum of the engine.

Q. What do you mean by sheaves?

A. Well, if you went to lead it over that way you would have a block from that so that a wire could go through that and come down to the drums on the engine.

Q. Do you think you could take this model here, and show his honor the position of the A frame and the boom and just how the wires lead down the boom and to the engine, and just the position of the blocks—could you take these pens and this model, here?

A. (The witness indicating and demonstrating with a model.) This would be the A frame of the boat. This is a short mast that comes in here between. That mast sets on this turn-table here and that revolves. This main boom then, is out here in this position, coming down on this drum. From other blocks hung down to pick up the load from the boat, and this lifts up through this block on the short mast and comes down there.

Q. Is this the lift?

A. Yes, sir; one is a topping lift and the other is a swinging boom down here, the loading lift.

170 Q. There are two separate and distinct appliances?

A. Yes, sir. One of those to hold the boom stationary for while you are lifting your load, and the other is to work on this block here, with the sheaves, into this mast.

Q. We are talking about the lifting.

A. Well, the lifting comes down through and comes to this mast and runs down this mast and down to the drums on the engine. That is the lifting purchase.

Q. Is this point here, on the boom, known as the head of the boom here?

A. Yes, sir.

Q. And this is the heel of the boom?

A. Yes, sir.

Q. The heel of the boom is at the mast?

A. Yes, sir; the heel of the drum is on the bull-wheel.

Q. Now, that portion of those wires which lifts in the load, is that known as the fall?

A. Yes, sir; that is a fall.

Q. And that portion of the wire which holds the boom up is known as the topping lift?

A. Yes, sir.

Q. This fall—how many blocks were used?

A. There was a block at the head of the boom for this special fall, and another one hangs down here—large blocks.

Q. Then the wire comes over the top of the boom to the engine?

A. Yes, sir. Comes down to the engine.

Q. This boom, is it longer than the barge?

A. Oh, yes.

Q. A good deal longer than the barge?

A. Yes, sir. Of course, if they want to bring the load up close, they top this boom up higher and high enough to raise it up clear

of the barge and that boom swings in any position they want it to lift the load.

Q. How much longer is it than the barge?

171 A. I think her boom is probably eighty feet long.

Q. Eighty feet long?

A. Yes, sir.

Q. About how long is that barge?

A. I think the barge is probably seventy-five feet or somewhere in that neighborhood.

Q. The A frame is somewhere in the middle?

A. I think it is nearer the bow than the stern, but near the middle.

Q. Does the boom swing out from the bow?

A. Yes, sir; it swings out over the bow.

Q. Do you know the size of the blocks on that barge?

A. No; I think they are somewhere about or twenty-four inch blocks.

Q. Do you know how many sheaves?

A. Either four or six.

Q. Do I understand you to testify that Captain Knudsen was on the barge when it was brought down to Chickasaw?

A. Yes, sir.

Q. And that he was on the barge at the time it was over at Harrison Brothers?

A. Yes, sir; I suppose he was on there. I don't know who was on there at Harrison's. The barge was over there, but I didn't go over there, but I understood that he was on there.

Mr. KILBORN. We move to exclude his statement that he was on there, because it is apparent from his testimony that it is hearsay.

The DEPUTY COMMISSIONER. The motion is granted, as to his stating that he was on her at Harrison Brothers.

Mr. PILLANS. That is, just the statement that he was on her at Harrison Brothers, but not as to the rest of his answers.

DEPUTY COMMISSIONER. Yes, sir.

172 Examination continued by Mr. GRESHAM:

Q. Did I understand you to testify that at any time you shifted that barge to the Alabama dry dock after you brought her down, that you put her over there?

A. Yes; I shifted her over there, but I don't exactly remember when I shifted her there. When I carried her back from the Southern dock I am pretty certain I carried her down to the Gulf Navigation Company to pick up some boilers.

Q. Who was on her at that time?

A. Captain Joe and the engineer.

Q. Captain Joe Knudsen?

A. Yes, sir.

Q. Do you know who those boilers were picked up for?

A. No. They belonged to the Gulf Navigation Company. I don't know who they were picked up for. He got orders to take her down there, that they had some boilers to move.

Q. Captain Joe got the orders?

A. Yes, sir. He said Mr. Benson wanted her down there and gave me orders, and I got her down there, and it was getting night.

Q. Do you know whether any repair work was done on that barge at the Alabama?

A. They were doing work on her. I don't know what all work they did, but they were doing quite a lot of work on her there.

Q. You are not a rigger by trade?

A. No, sir; I am not a rigger.

Examination by Mr. KILBORN:

Q. Captain Roberts, you and Mr. Knudsen and Captain Charlie Benson here have all been good friends a good many years?

A. Yes, sir; ever since I have been in Mobile.

173 Q. Did Mr. Knudsen, at any time prior to the time that he was hurt, get a job to do any work on the Steamship "Apollo," on the other side of the river?

A. Yes, sir; he had a job with the owners of the "Apollo" to take up the hull that was sunk there in the slip. He had been taking some of the machinery off her.

Q. Mr. Knudsen had that contract?

A. Yes, sir.

Q. Mr. Benson had nothing to do with that?

A. No, sir; not that I know of.

Q. Did you have anything to do with that?

A. No, sir; not that contract.

Q. It was Knudsen's contract with the owners of the "Apollo"?

A. Yes, sir.

Q. Where was the "Apollo"?

A. She was in the Southern slip.

Q. At the Southern dry dock, up in the slip?

A. Yes, sir.

Q. Now, did Mr. Knudsen make any arrangement with you for the use of your own derrick barge in the "Apollo" job, over at the Southern dry dock slip?

A. Yes, sir; I just loaned him the boat. He asked me to loan it to him.

Q. Did you loan it to him without any compensation?

A. Yes, sir.

Q. Just as a good friend; an act of friendship?

A. Yes, sir.

Q. While he had your derrick barge over there, under that friendly borrowing, did your barge sink?

A. Yes, sir.

Q. While in his charge?

A. Yes, sir.

Q. Did you ask him to get it raised?

A. I asked him what he was going to do about it and he said he was going to get it raised as soon as he could, and he was, at that time, working for Mr. Benson up at Chickasaw.

174 Q. And got off temporarily to take this job of his own, on the "Apollo"?

A. No, sir; he didn't get off. He finished the boat and got out, and I brought the boat down for Mr. Benson, and put her over at the Southern docks.

Q. Put what over there?

A. This State derrick dredge.

Q. Who was Knudsen working for when he took this "Apollo" job?

A. He was working for himself. He wasn't working for anybody else.

Q. Had he been working for Mr. Benson on this barge he had gotten hurt on?

A. Yes, sir.

Q. Previous to that time, he had been working for Mr. Benson, on this dredge; anyhow he took this "Apollo" job for himself?

A. Yes, sir.

Q. And he borrowed your boat to do it with?

A. Yes, sir.

Q. Your boat sunk?

A. Yes, sir.

Q. Then, do you know whether he borrowed Mr. Benson's derrick barge?

A. What?

Q. Do you know whether Mr. Knudsen borrowed Mr. Benson's barge to raise yours?

A. I don't know how he came with Mr. Benson's barge. All I know is, he was digging out the barge for Mr. Benson. He had quit the "Apollo" and gone up there to work for Mr. Benson, and left my derrick in the slip, and while he was up there working for Mr. Benson, my derrick sunk in the Southern slip.

Q. While he was up there working for Mr. Benson, your derrick sunk in the slip?

A. Yes, sir.

Q. Then, what happened?

A. I left it there and went up the river, and when I came back the derrick was away over there and down at Harrison's yard.

175 Q. Do you know whether or not Captain Knudsen borrowed Mr. Benson's dredge in order to raise yours?

A. I don't know whether he borrowed it or rented it or how he got it, but he was working on the derrick at the time.

Q. On Benson's derrick?

A. Yes, sir.

Q. Do you know whether he used Benson's derrick in order to raise yours?

A. Yes; he did.

Q. Do you remember on one occasion that Mr. Benson telephoned to you to get Joe and meet Benson with Joe, in the Bienville Square here, about Knudsen's borrowing Benson's derrick?

A. Well, I don't exactly know whether he wanted to borrow it or whether he rented it, or how he got it, but he rang up and wanted to know where Joe was. Joe was living with me.

Q. Did you meet Mr. Benson in the square, along with Joe Knudsen, about using Benson's dredge to raise yours?

A. Possibly I did.

Q. Do you remember?

A. I don't remember of any question about my having anything to do with Captain Joe getting the derrick.

Q. You don't remember the conversation in the square?

A. No; I asked Captain Joe, "What are you going to do about raising my derrick," and he said he was going to get Benson's derrick to raise my derrick up with.

Q. Then what happened after he told you that?

A. He finally got the derrick and carried her over there, or how she got back there, I don't know. She had gone to Harrison's and I went up the river and when I came back she was back in the slip again.

Q. Did he raise your derrick?

A. Yes, sir; he raised mine.

176 Q. Joe Knudsen did?

A. Yes, sir.

Q. Do you know whether the cable was cut on Mr. Benson's derrick?

A. I didn't know anything about the cable being cut and didn't know until I came back home and talked with Mr. Benson, and he wanted to know where Joe was. I had gone up the river again. When I took that derrick, after he raised my derrick, I carried that derrick back to the Gulf Navigation Company to lift some boilers. I left her there and went back up the river again. I worked for the mill company, and when I came back the boat was over at the Alabama dry dock.

Q. That is Mr. Benson's boat?

A. Yes, sir.

Q. What conversation did you have with Mr. Benson in regard to Knudsen having cut the cable on Mr. Benson's dredge boat?

A. I talked to Mr. Benson over the phone, and he told me Joe had cut his cable, and he had a chance to rent his boat and he could not do nothing with it because the cable was cut, and I told him my wife said he had gone to Pascagoula.

Q. Did he say anything to you about expecting you and Joe to splice it?

A. He did not. He said that Captain Joe had promised to splice it.
Q. Did he say anything about paying Captain Joe for splicing it?
A. No, sir.
Q. You then communicated with Knudsen and told him that Mr. Benson was expecting him to splice this cable that he had cut?
A. I did.
Q. And the next day Knudsen came by your house?
A. Yes, sir; came up that night, and I took him, the next morning, and he went over there, and I followed him over with the other man, to splice the cable.
177 Q. At the time Mr. Knudsen got hurt, was Mr. Benson over there?
A. No, sir; he wasn't there, when he got hurt.
Q. You took a man named Floyd Lennis to assist Knudsen in splicing the cable, didn't you?
A. Yes, sir.
Q. Who was Lennis working for?
A. For me.
Q. And, was being paid by you?
A. Yes, sir.
Q. What were you doing over there assisting him?
A. I went over to help Captain Joe to do what I could to get the cable spliced.
Q. Were you charging Mr. Benson for the service?
A. No, sir.
Q. Or Mr. Knudsen's services?
A. No, sir. Lennis was staying on my boat.
Q. You took your man Lennis and yourself over there to assist Knudsen in this splicing operation?
A. Yes, sir.
Q. Do you know, of your own knowledge, whether Mr. Knudsen had made any arrangement with Mr. Benson for that operation of splicing?
A. No; I don't know anything about it.
Q. When you got over there, did you see Mr. Jerry Woolsey over there on Mr. Benson's barge?
A. I don't know. There was an engineer there. I suppose he was an engineer. He was at the engine when I was there.
Q. Who directed what was to be done in this swinging of the barge around?
A. Captain Joe Knudsen.
Q. Mr. Joe Knudsen, the claimant?
A. Yes, sir.
Q. And I understand, the only person on that barge at the time that Knudsen was hurt that was working for Benson was the engineer, was it?

Mr. GRESHAM. We object to that, because that was not
178 what the witness testified to. He testified that Mr. Benson telephoned the witness, asking for Joe Knudsen to splice that

cable, and that there was nothing said about compensation; that the witness went over there with Lennis and when he got over there there was an engineer over there.

Mr. KILBORN. All right, I withdraw the question.

Q. How did it happen that you and your man was over there; under what arrangements?

A. Nothing more than to see that the cable was spliced for Mr. Benson, both being friends of mine, I went to assist them. Mr. Benson said it depended on the splicing of that cable; they would not take the barge unless she was rove up.

Q. Hadn't Mr. Knudsen told you that Charlie Benson, the defendant in this case, had loaned him this barge to assist in raising yours, and wasn't that the reason why you and your man were over there assisting?

A. Yes; he did tell me that Mr. Benson had loaned him the derrick to raise my barge.

Q. And that is the reason why you and your man Lennis, went over to help Knudsen in the splicing operation?

A. Yes, sir; I suppose it was. I had loaned him my barge and it had got sunk, and so far as Mr. Benson was concerned, I had been working for Mr. Benson and I thought I would be a mighty poor sort if I could not help him out.

Q. You were all friends at the time?

A. Yes, sir.

Q. When Joe did work on this derrick barge of Mr. Benson's, prior to the time he was hurt, he was working on there as a member of the crew?

A. On the derrick; yes, sir. He was working on the derrick up there when he dug her out up there at Chickasaw.

Q. He was a member of the crew at Chickasaw?

A. Yes, sir; he seemed to be a kind of foreman on there. They worked under his orders.

179 Examination by the DEPUTY COMMISSIONER:

Q. What do you understand, "as a member of the crew"?

A. "As a member of the crew," he was the man that gave orders on the boat. He was working on the boat. He was using her and moving her about and they worked under his orders while he was handling the derrick.

Examination continued by Mr. KILBORN:

Q. What work was the derrick doing prior to the time that Knudsen was hurt and when Knudsen was on it?

A. I have already stated what I know she was doing. The last thing I knew she was to move those boilers down there for the Mobile and Gulf Navigation Company and put them in the water, and I put her down there and left her.

Q. Was Knudsen on her then?

A. Yes, sir; he was.

Q. How many days was that before he was hurt?

A. I possibly think, four or five days. It might have been a little longer and it might have been not quite so long. I had gone back up the river.

Q. Don't you know that it was about June the 11th, the last time that Knudsen worked on this barge, before he was hurt?

A. Now, I don't think it was that long, but I don't know. I won't say positively, because I don't remember exactly about the time. She was over there at the Alabama Docks. I seen her laying over there some time, but whether he was on her then, I don't know. I was coming and going up the river all the time.

Q. The last time you do know that Knudsen was on her, was when she was down at the Mobile and Gulf Navigation Company.

180 A. That is when I left him on her; yes, sir.

Examination by Mr. GRESHAM:

Q. That engineer who was on that derrick barge the morning that Captain Knudsen was hurt, did you pay him for being over there, the man who was operating the engine on the derrick barge?

A. No, sir.

Q. Who was he employed by?

A. I don't know anything at all about him, any more than he was on there.

Q. Did Captain Knudsen have anything to do with bringing him over there?

A. I don't know. He was on the barge when I got there.

Q. But you don't know how he got there?

A. No, sir.

Q. You didn't pay him?

A. No, sir.

Q. And didn't bring him over there?

A. No, sir.

Q. Didn't have anything to do with bringing him over there?

A. Not a thing.

Q. Did I understand you to testify that Mr. Benson told you he had to have those blocks rove up in order to get that barge ready for this other job?

A. Yes, sir.

Q. Do you know what Captain Knudsen's business or trade has been?

A. He is a rigger, a ship rigger.

Q. Do you know how much experience he has had as a ship rigger?

A. Quite a bit of it. He was boss rigger out at Chickasaw during the war, as boss rigger, and he was under me as foreman of a gang.

Q. How many years experience has he had as a rigger.

181 A. I found him out there, and he was out there eight or ten months while I was there. He was under me.

Q. How long ago has that been?

A. That was during the war.

Q. Eight or ten years?
A. Yes, sir.
Q. Has he had experience around the harbor during that time, too?
A. Yes, sir; he is a diver and a rigger.
Q. You took Captain Knudsen to the hospital at Mobile?
A. Yes, sir.
Q. Did he seem to be hurt?
A. Yes, sir.
Q. Hurt very badly?
A. Yes, sir.
Q. Seem to be suffering?
A. Yes, sir.
Q. Suffering a good deal?
A. Yes, sir.
Q. Where is Captain Knudsen staying at this time?
A. He is in the hospital.
Q. He has been disabled from that injury from that day until this day?
A. He is in the hospital yet.

The DEPUTY COMMISSIONER:

Q. Isn't that Captain Knudsen that is sitting behind you?

Mr. GRESHAM. Yes, sir; I was simply stating that Captain Knudsen was taken to the hospital and has been there ever since.

Examination by Mr. GRESHAM:

Q. So there were some weeks between the time you brought the derrick barge down from Chickasaw, until Captain Knudsen was hurt?

182 A. There was some time in there. I don't know how long it was. I know she was over at the Alabama and they were doing some work on her, but what work they were doing, I don't know.

Q. That derrick barge of yours, what would it weigh, the one that was sunk?
A. Do you mean her dead weight?
Q. No.
A. Her lifting up weight?
Q. Yes.
A. Seventy-five or a hundred tons, with the mud and water she had in her; somewhere in that neighborhood.
Q. Can you tell us the diameter of that drum on that winch on the barge "Chicksaw"?
A. No, sir; I do not know the diameter. I suppose, in the neighborhood of three feet, or maybe two and a half or something like that.

Mr. KILBORN. You had loaned your barge to Knudsen without any compensation or agreement about compensation or thought of compensation, hadn't you?

Examination by the DEPUTY COMMISSIONER:

Q. Did you see Knudsen get hurt?

A. Yes, sir.

Q. How did he get hurt?

A. He was standing forward when I left him to go back aft and slack her away, and he was going to pull her head around with the steam winch, and he had a line fastened in a block there, which led down to the wharf. He was going ahead on that engine to pull that wire up, so as to swing her around into the slip and that line fastened to a piece of timber on the wharf and that piece of timber pulled off and came up the side bits on the side of the barge
183 and the end of it got caught that bit and the bight of it got around his leg and he must have stepped over it or fell over it, or something—I didn't see it exactly at the moment, but when I saw him his head was on the barge and his foot was up in the air when I ran and slacked it up and took him off and he was hurt.

Q. Was he rendered unconscious?

A. No, sir; he wasn't unconscious, but his leg was broken here and in the kneecap.

Q. What statement did he say to you immediately after he got hurt?

A. He said his leg was broke. His leg was broke and he was in great pain and suffering a great deal.

Q. He didn't say anything further in regard to the nature of his connections with Benson?

A. No, sir; he didn't say anything in regard to that at all.

Examination by Mr. KILBORN:

Q. The trouble happened when the timber gave way that he fastened the line to?

A. The line was fast to this stringer on the wharf and it gave way.

Q. Who had fastened it to that timber?

A. I guess he did himself.

Q. He was directing the whole operation?

A. Yes, sir.

Examination by Mr. GRESHAM:

Q. Why was it necessary to swing the barge around?

A. So that this boom would lay down on the wharf. The barge was laying like this, and he took a line here and made it fast out here and it led up to that block up there, and then down to the engine, and he wanted to swing this barge around so as to lay this boom down on the wharf so he could uncouple it and splice it and put it in.

184 Q. Was there a block hanging right here where my pencil point is?

A. Yes, sir; on the end of the boom, and there was another block up here.

Q. That was the block that Mr. Benson wanted rove up?

A. Yes, sir; those were the blocks.

(Thereupon this witness was excused.)

Captain JOE KNUDSEN, called as a witness by Mr. Gresham, after having been first duly sworn by the deputy commissioner, testified as follows:

Examination by the DEPUTY COMMISSIONER:

Q. State your name, please.
A. J. B. Knudsen.
Q. You are claimant in this case?
A. Yes, sir.
Q. What is your address?
A. At the present time the marine hospital.
Q. You came from the marine hospital this morning?
A. Yes, sir.
Q. And when this case is over you are going back there?
A. Yes, sir.
Q. When were you born?
A. In 1869.
Q. Have you done any work since you got hurt?
A. No, sir.
Q. Any doctor that has been treating you tell you that you were able to return to work?
A. No, sir; they are treating me, but they say that it is a chronic injury and I will never be able to do any work.
185 Q. Still treating you at the marine hospital?
A. Yes, sir; they are treating me.

Examination by Mr. GRESHAM:

Q. Captain, it is your right leg that was injured?
A. Yes, sir; that knee.
Q. Is it any shorter than the left leg?
A. Yes, sir; it is about two or three inches shorter.
Q. Before you were hurt, was anything the matter with that right leg?
A. No, sir.
Q. And your right leg is about three inches shorter by reason of the injury?
A. Yes, sir.
Q. What has been your trade?
A. Well, rigging and working on the water and dredging and construction work of all kinds and different kinds.
Q. How many years' experience have you had as a rigger?
A. I have been doing it off and on for possibly twenty-five or thirty years, I should say, on different jobs here and there.
Q. Tell his honor just how you were hurt and what you were doing.
A. Well, when I got back from the "Warrior Service" people, Mr. Benson asked me to go to Chickasaw and help to get that derrick up, so I went up there and we worked under Mr. Benson's orders—the engineer and I—and we had some boys there also, and

when we got the derrick out, and during the time I was up there, a heavy norther came up and this derrick of Captain Roberts' was tied up at the Southern docks. As the river went down it got on the wharf and turned over and sunk into the slip, and I went down that morning and Captain Beaury Roberts came up and asked me if I had time to go down that morning, and I went down and saw it sunk, and I could not do anything that morning, and I went
186 back to Chickasaw to get that derrick out at Chickasaw for Mr. Benson. Eventually we got it out of there. Well, we suggested to go to the Southern docks, because I had a permit to leave Benson's derrick there, because I was working there a good deal, and we had a little junk on that "Chickasaw" derrick that would be in the way, and we put it on the wharf.

Q. Who do you mean by "we"?

A. All of us. You know we were going to the Southern docks and have that derrick there, because I had to reave up the fall Mr. Benson got. Mr. Benson brought a big reel of wire on board and he wanted that hoisting fall rigged up and by going there I could lay my boat on the wharf and go to work and reave that fall up, so we thought that would be the best place to go.

Q. Who do you mean by "we"?

A. All of us; the engineer.

Q. Was Mr. Benson in that "we"?

A. Yes; he knew I was going there.

Q. Did he know you were going there?

A. Sure.

Q. So, who you mean, "we decided," that was me and Mr. Benson?

A. Me and the engineer there; we decided to go down there and have that fall reve up, you see, so Benson said he wanted that fall reve up. He made us understand before we left Chickasaw that he wanted the new fall on there. Mr. Benson had us to understand that. He said the old wire that was on there was not safe, and that is why he wanted the new wire on there.

Q. What was the condition of that old wire?

A. It was bad. It was not trustworthy. You could not depend on it. It was an old wire, three-quarter wire, that had been there for years and years and you could not depend on it, and it was rusty and decayed in places.

Q. Now, at that time, who was paying you?

A. Charlie Benson.

187 Q. How much was he paying you?

A. I got $5 a day for every day I worked. Five dollars a day. So I layed the boom down on the wharf to reave up the new wire, so now we had two four sheave blocks.

Q. Explain what you mean by the sheaves in the blocks.

A. The sheave is a round concern which the wire lays in in the block.

Q. Is it a wheel?
A. Yes, sir.
Q. There were four of these wheels in that block?
A. Yes, sir; four of those wheels.
Q. That block was shaped in a kind of U?
A. It is kind of oblong.
Q. And there are wheels in that block?
A. Yes, sir; in the block.
Q. And the wheels are supported by a kind of bolt that runs through there?
A. Yes, sir; through the center.
Q. Through the block and through the wheels?
A. Yes, sir.
Q. And there were four of those wheels or sheaves in those blocks?
A. In those blocks; yes, sir.
Q. Now, explain to his honor where those blocks were?
A. One block was under the end of the boom here, and the other block was hanging down like that, from the boom. Now, I spliced that wire and we had to turn this barge around like that, on the wharf, so I could lay that boom on the wharf and unloosen that wire up there, and get hold of the end and splice more wire to it.
Q. You started talking about when you first put that new wire on there,—explain how you put it on that time.
A. Well, I laid this on the wharf.
Q. Laid what?
188 A. This boom, here; laid it down, something like that, on the wharf, low enough for me to stand on the wharf to reach that block there, and took that old wire out, unloosened that nut and took the old wire out that was there, and when we got that old wire out we took the new wire from the barge and rove it in there in these blocks, and then, when I had it rove in there and fastened up, then I topped this boom up like that.
Q. How much wire did you put in there?
A. Around about seven hundred feet.
Q. Do you know how much wire was on that drum?
A. Yes, sir—I don't know exactly how much it was.
Q. I mean, on the reel.
A. I could not say. We took a whole lot of wire off there and put a new topping lift on there and took, probably, about ten or eleven hundred feet for the topping lift. We did that at Chickasaw under Mr. Benson's orders.
Q. Who owned this new wire that you put in there?
A. Mr. Benson brought that wire up there for me to put in there.
Q. Well, now, after you got that new wire on that fall, what have you to say as to whether that was properly done or not?
A. Well, to my estimation, it was properly done.
Q. Why, explain it.
A. Because I rove up three of those wheels in there.
Q. How many parts does that make?

A. That would make seven parts, and there is one part that comes in there that I fastened to the bottom block, which will make the seventh part.

Q. What is the size of that wire?

A. Seven-eighths.

Q. Steel cable?

A. Yes, sir; seven-eighths rule in diameter.

189 Q. How much would the boom, so rigged, raise—what weight?

A. Thirty-five to forty tons, I presume.

Q. What is the capacity of that derrick barge?

A. Well, that is what I meant? The barge will stand up. The steel boom, itself, will hold about thirty-five or forty tons.

Q. How much would that wire, as you rigged it, hold?

A. That will hold over one hundred tons, or more.

Q. The barge, itself, won't stand up to more than forty tons?

A. It won't stand up to more than forty tons.

Q. Then she starts tipping?

A. Yes, sir; then she goes down under the water and will be unsafe and turn over on you, bottom up.

Q. After you had that new wire rove, what happened then?

A. Then the blocks were hanging down about four feet after the boom stood up straight or about ninety-five degrees, and then the block was about four feet off of the deck, so we decided—that is, Smith, the operator and I, that the best way to do would be to get that wire and cut that wire that length and put it on the drum. It would not be advisable to have it any longer, because too much wire on the drum cuts the wire up and interferes with the other drum, so we cut the wire and fastened it to the drum and then we put the chain sling on.

Q. How long a chain?

A. About ten or twelve feet—about ten feet, to my best knowledge.

Q. Then, what happened; what did you do with the barge; what did Mr. Benson do with it?

A. Well, that barge was laying in the slip, and we were waiting there, and Harrison had his barge at that slip, sunk.

Q. Whose slip?

A. Harrison's slip.

Q. That is a different slip from the Southern slip?

190 A. Yes, sir. And he said, "We want you to raise our barge, first," and he said, "All right." I said to Mr. Harrison, "You must see Mr. Benson about that," and Benson gave us both orders to go down to Harrison's to raise his barge up. That was the first work we done.

Q. After Mr. Benson gave you those orders, to go to Harrison's slip, what happened next?

A. Then we went back up to the Southern docks.

Q. Did you go to Harrison's slip?

A. Yes sir.

Q. What did you do after you got there?

A. They had slings and there was a sunken boat with wire around it, and we lowered our fall down and placed the derrick in position, and also, our fall down, and got our sling into that sling that was around that sunken barge of Harrison's.

Q. What did you do with it then?

A. We lifted her up.

Q. You lifted her up?

A. Yes sir.

Q. Who paid for lifting that barge?

A. Well, Mr. Benson paid the crew on the barge.

Q. Who did Mr. Harrison pay for lifting it?

A. Paid Mr. Benson.

Q. Do you know how much?

A. I don't know. That was Mr. Benson's bargain.

Q. Mr. Benson made the trade with Mr. Harrison?

A. Yes sir. I don't know nothing about that.

Q. How far is Harrison's slip from the Southern dry dock's slip?

A. It ain't far. I presume, about two city blocks.

Q. It is six or seven hundred feet?

A. Oh, it is more than that—a little more than that.

Q. What else did you use this derrick barge for besides raising Mr. Harrison's barge?

191 A. Then we went up to the Southern docks, after we were through with Mr. Harrison; then Benson notified me that Baker wants the derrick to go up the river to raise one of his barges.

Q. Who notified you?

A. Mr. Benson.

Q. Did you go up the river?

A. Yes, sir; the tugboat came and got us and went up the river and raised that barge.

Q. What kind of barge was that?

A. A derrick barge.

Q. Was that at the bottom of the river?

A. Yes, sir.

Q. Did you raise it?

A. Yes, sir; we raised it.

Q. Now, that lifting, did that cable or fall; did that part in any way, when you were lifting Baker's barge; did it break?

A. No, sir; because that would hold over one hundred tons. Each part was guaranteed twenty-five to twenty-eight tons, and I had seven parts.

Q. Did you have any trouble for breaking of that wire, in raising Harrison's barge?

A. No, sir; we heaved that barge down and the deck was six or seven inches out of the water.

Q. Did it tip the "Chickasaw" barge?

A. Yes, sir; down to seven inches of the water, and that is all that barge could stand to be safe, but we done the work all right.

Q. Now, who paid for that Baker barge; who paid for the use of the "Chickasaw" on the Baker job, if you know of your own knowledge?

A. I don't know.

Q. Did they pay you anything?

A. No, sir; I was just under Mr. Benson's orders. Mr. Benson was paying me and that was Benson's work.

Q. What was Benson paying you; $5.00 a day?

A. Yes, sir; I was there as a worker. He was paying me $5.00 a day, just like the rest of them.

192 Q. Did you get any money from Baker?

A. No, sir.

Q. Then, where did the derrick barge, the "Chickasaw," go from raising that barge for Baker?

A. After we raised the barge up the river for Baker, we brought Baker's barge down to Henderson's dry dock.

Q. Henderson's?

A. Yes, sir.

Q. Under whose orders was it brought down there?

A. That is what they wanted that barge down there for; to have it hauled up; Mr. Baker did.

Q. You brought Mr. Baker's barge down?

A. Yes, sir; the "Chickasaw" barge was holding her up in the sling. We could not turn her loose, or she would have gone to the bottom and we were holding her up like that when we got her down there, and then they got her pumped out and she would float herself.

Q. But the derrick barge "Chickasaw" brought this barge of Baker from the place where she sank down the river, to Henderson's dry dock, is that right?

A. Yes, sir; a tugboat came and brought both barges down there.

Q. And your barge, the "Chickasaw," the barge you were on, was holding up Baker's barge?

A. Yes, sir; holding up Baker's barge.

Q. How far was it from the place where Baker's barge had sunk, down to Henderson's?

A. I don't know; three or four miles.

Q. Then, what did Mr. Benson do with this barge "Chickasaw" after bringing Baker's barge to Henderson's?

A. To my best remembrance, that same tugboat, after we delivered her to the wharf safe, that same tugboat that brought us down there, took us back up into the Southern slips.

Q. Did you order that tug; did you pay for that tug; the tugboat that shifted you from where Baker's barge was raised; did you pay for that tug?

193 A. No. I think it was Captain Roberts had her brought up there.

Q. Did you pay Captain Roberts?

A. No, sir.

Q. Who paid him?
A. I don't know.
Q. Did Mr. Benson pay him?
A. I could not say if he did or not.
Q. You didn't pay him?
A. No, sir.
Q. You got no money from Baker?
A. No, sir.
Q. And you got no money from Harrison?
A. Sure not. I was working for Benson.
Q. At $5.00 a day, all t is time?
A. Yes, sir. I had no time to do anything for anybody else.
Q. Did Mr. Benson's barge "Chickasaw," do any other work besides raising Harrison's barge and Mr. Baker's barge?
A. We went back in the slip and got to work and raised Beaury Roberts' barge and we got her up and took her out of the slip and landed her there where Captain Beaury Roberts wanted her landed.
Q. Then, did you do any other work?
A. Yes, sir; took her down to Radcliff's.
Q. The Mobile and Gulf Navigation Company?
A. Yes, sir.
Q. What did you do with her there?
A. There were two big pontoons, shaped like two boilers, on the docks, framed in, and that was a big lift, too, and they wanted us to put that into the water off of the wharf, and we hooked onto that and put it in the water. It was a big lift, but the barge did it all right.
Q. Did the fall break any way?
A. No, sir; it would be impossible for it to break.
Q. Who gave orders for the "Chickasaw" to go from the Southern dry dock slips down to Radcliff's, the Mobile and Gulf Navigation Company?
194 A. Mr. Benson notified me that he wanted the barge down there.
Q. Were you being paid then, $5.00 a day?
A. Yes, sure I got paid.
Q. Were you paid any money from the Mobile and Gulf Navigation Company for lifting those pontoons into the water?
A. No, sir.
Q. Did you make any trade with the Mobile Gulf and Navigating Company for lifting those pontoons?
A. No, sir; I had nothing to do with that. Mr. Benson attended to that and I was working for Mr. Benson.
Q. Then what happened?
A. That barge was leaking and it was unsafe for that barge to be in the water any longer, and she was liable to go down, and Mr. Benson decided that he wanted her caulked and he took us over into Henderson's dock from Radcliff's wharf, to my best knowledge, and Mr. Benson had a sunken barge there, in that slip, and Mr. Ben-

son requested me to put wires around that barge. He wanted that lifted up and pumped out, so that he could get it out of the way. All right, I got my wires ready and Mr. Benson was over at Henderson's docks, too, off and on, and I says to Mr. Benson, I am ready, I have the wires there and I think it will do the work, and if you are ready we will hook on and Mr. Benson said, "Never mind, we won't bother with that now, just take your wires off and put it on the derrick."

Q. Where did you get that wire?

A. We had it on the derrick barge.

Q. Was that a part of the new wire?

A. No, it wasn't a part of that new wire, but it was a good wire that was on the barge before.

Q. Then, what was done with the "Chickasaw"?

A. Then, we took her across the river on this side from Henderson's dock and put her on that old Alabama dry dock.

Q. Did you stay on her or leave her?

A. I stayed on her.

195 Q. What did you do then?

A. General repair work, all the way through.

Q. Tell us what it was?

A. Well, chipping rust off the iron, painting, moving different things, just different things. Just work around a barge.

Q. Chipping iron off of where?

A. Off those iron frames.

Q. Did you do that yourself?

A. Yes, sir.

Q. What else did you do?

A. Well, painted a little bit and did general work, helping around from one thing to the other.

The DEPUTY COMMISSIONER. Are you talking about the barge now, that you got hurt on?

A. Yes, sir.

Examination by Mr. GRESHAM:

Q. Was there any other work being done on her?

A. Well, that boom was weak and it needed strengthening.

Q. Was any other work done on the "Chickasaw"?

A. On the dry dock it was caulked and they worked on some of those side spuds.

Q. What other work did you do besides chipping and painting the A frame?

A. I helped to paint.

Q. Did you use a brush yourself?

A. Yes; I helped paint.

Q. What other work did you help to do?

A. I helped clean up that engine and different things.

Q. Did you do any work on the cabin?

A. Different things that way.

Q. Did you do any work on the cabin?

A. Yes, sir.

196 Q. What did you do?

A. I helped to put a new roof on the cabin.

Q. Did you do that yourself?

A. Yes, sir; with the rest of them.

Q. Did you use the hammer and nails yourself?

A. Yes, sir.

Q. Who was paying you at the time you were doing this repair work?

A. Mr. Benson was paying me.

Q. At what rate?

A. Five dollars a day.

Examination by the DEPUTY COMMISSIONER:

Q. How long did you work at that?

A. To my best judgment, I was about five days on that dry dock on this side of the river, and then we were taken into the water and then the boat took us over across the river to the other dry dock and then they done some work on the boom, and I think they stayed over there about three weeks or maybe four weeks.

Q. All of this was before you got hurt?

A. All of this was before I got hurt.

Q. Were you working on her during those three weeks?

A. Yes, sir.

Q. You got $5.00 a day?

A. Yes, sir.

Q. Did you work on Sundays?

A. No, sir.

Q. Six days a week?

A. Yes, sir. Some of them worked on Sundays, but I didn't.

Q. After the barge was taken across the river, what work was done on it?

A. They reenforced that big boom and we laid there and I worked on the house and on the cabin and all the way around and Charley says he wanted that new fall oiled and I oiled that fall and

197 then Charley says, Knudsen, let's reeve up all those sheaves and see how it will go.

Q. How many were there?

A. Four. And I took hold of the fall and rove up all of it and he said well, we will change it back like it was before and I did that and Mr. Benson had brought some big blocks there with six sheaves in it and he said, I want those rigged up and I said all right and I rove those up and the fall then was too short for a six big blocks and I told Charley that it would not do and he said, well, all right, we will rig up the other kind again and I took them up and rove up the other way.

Q. That was all while the barge was over at the Alabama?

A. Yes, sir; and Charley said, that wire is too short.

Q. You mean Mr. Benson?

A. Yes, sir; Mr. Benson said, the wire is too short now, and I said, well, now, that can be spliced if you want those blocks and I said, it ain't necessary to have six blocks. The blocks you had before are the best blocks and those are he has in his derrick to-day working them. He said, do you think you can splice the wire? and I said, yes, sir; any time you want it done, I will splice it and I said, do you want it done now, and he said, well wait awhile and we will see and I said, all right, and I kept working along for a few more days and then he says to me, that wire is entirely too short and I says, yes, if you use those blocks, and he says well, we have got to have the wire spliced and I said, all right, I will get ready for it and that day I took the wire off that big reel he had there and got ready and Charley says to me, don't put the splice in until you notify me and when I got ready I phoned Mr. Benson and I said, do you want that wire spliced now, I have everything ready, and he said no, let it go for awhile and I left it that way and put it back on the reel again and I worked along there until there was
198 no more work for me to do and I went to Mr. Charley and I told Mr. Charley Benson, there ain't no more for me to do there so I will quit, and he said, all right, and I said, I don't want to stay when there is no more work to do and he said, all right, you can go, any time I need you I will call for you, and I said, all right, I thank you, Charley, I will be glad to work for you, so I left. So a long time after, it may be two or three weeks—something like that—Charley rang me up over the telephone.

Q. Mr. Benson?

A. Yes sir.

The Deputy Commissioner. Every time you say Charley you mean Mr. Benson?

A. Yes, sir.

Examination by Mr. Gresham (continued):

Q. Sometimes you say Mr. Benson and sometimes Charley, every time you say Charley or Benson you meant Charley Benson, the defendant in this case?

A. Yes, sir; so I said all right, Mr. Benson, I will, and he says I will want it spliced in about a few days and I said all right and I took a trip down the coast. I think it was Thursday night I went down the coast and I came back on a Saturday night. When I came back about ten or eleven o'clock on that train from down the coast there was a slip there written on my pillow case and one on my dresser in my room from Captain Borey Roberts, the gentleman who is sitting here before me, stating this: That Mr. Charley Benson wants you to come on board the barge "Chickasaw" Monday morning. Of course that was the Fourth of July, and splice this wire. All right that was on the paper. So then Sunday night, Mr. Borey Roberts had gone to Biloxi and he came back from Biloxi, but early in the morning he came in my room and said, Knudsen, do you

want to do that work for Mr. Benson? And I said, Yes, I
199 will work for Mr. Benson, and he said, He is in a hurry for this barge and it has got to go to the State docks to do work and he wants to have this work done to-day which is Monday, the Fourth of July. So I says, I will go, and so we got on board that morning. I got on board a little before Captain Roberts did and I raised steam. Put steam on the boiler.

Q. Raised what?

A. Steam—and got ready. And then there was another man came on board that claimed that he was a new operator.

Q. Who was he working for?

A. Mr. Charley Benson. I asked him, Who sent you on board here?' And he said, Mr. Benson, and he said, I am supposed to be the operator on this derrick and Borey Roberts was there and he came on there too and he was building a coal bin on the other end of the barge for coal to be put on the deck. Captain Borey Roberts asked me which way would be the best way to do this and I said, we have to swing this derrick around so that I can get this big large boom on the dock and he said all right, and I asked Mr. Roberts if he had any rope there and he said, yes, and he handed me a brand new rope and I tied that on that chain sling that was fastened to the block and I laid that over on the wharf and that wharf was very decayed and everything was bad about that wharf and the wharf wasn't much but I tied it the best I knew how on that and then I went to the throttle there and the operator said, I will run the machine and I said, all right, I will give you the signal and I took my stand in the front of the boat and I gave my operator this hand for a signal and kept my eye on the wharf where that fall was made fast Now, I told the operator to be very careful to go slow and watch my signals and he said he would so I went slow until he got in some of the slack off the fall and I stopped him. I put my hand up like that—that means stop—so I asked him to swing the boom over very slow and easy over this way and he
200 did and I stopped him. I put both hands up and stopped him. Now, I says, you must go ahead but go ahead slow and watch my signals and when I do like that, that means slow—that is the natural signal—so I stood with both hands up like that and watching that wharf over there and kept on watching it like that—so all at once, I stopped him and put both hands up like that but he kept going and I used the word "Stop" and hollered "Stop" as hard as I could and the machine kept going and I seen that the wire was going through the blocks and I was standing in a position like this and I said, if this man don't stop I have to run and I put my eyes on the deck to make a leap and just as I done that here comes the fall—it broke aloose off the wharf that I had it fastened to and struck me and knocked me down this way and then that fall dragged right in on the derrick and caught hold of my leg and broke my knee kind of sideways, and splintered it all to splinters.

The DEPUTY COMMISSIONER. Where were you standing at this time; on the wharf or on the boat?

A. On the derrick in front of the operator so he could see me.

Q. Were you standing on the barge?

A. Yes, sir; the barge "Chickasaw."

Mr. GRESHAM. You were standing there when you were hit?

A. Yes, sir.

Q. And the barge was afloat?

A. Yes, sir.

Q. In Mobile River?

A. Yes, sir.

The DEPUTY COMMISSIONER. Where the seagoing vessels come in?

A. Yes, sir; there was one laying a few feet from us—a big steamer and he seemed like he put more steam on it and when
201 I gave signals like that, that means as little as possible, so when I seen he done all this I just stuck up my hands for him to stop but he didn't stop.

Q. When you were knocked down, what were you knocked down on?

A. On the barge.

Q. On the deck of the barge "Chickasaw"?

A. Yes, sir; I was knocked down and stunned at the time and when I came to again about half a minute later, I seen that my foot was all twisted up like that. I got hold of it and put it down like that and felt everything was broken in there and I hollered to Captain Borey Roberts. He was over in the other end of the barge building a coal box and I hollered to him and told him my leg is all broke up.

Q. Did Roberts bring you back across the river?

A. Yes, sir.

Q. You were then taken to the marine hospital?

A. Yes, sir.

Q. And you were there ever since?

A. Yes, sir. And he came and took me up on one side and I told Captain Roberts——

Mr. KILBORN. I object to any further conversation in the absence of Captain Roberts.

Mr. GRESHAM. I don't think there are any more details necessary about the injury.

DEPUTY COMMISSIONER. No; he has explained it very fully.

Examination by Mr. GRESHAM:

Q. You have told us about how you were working on the barge "Chickasaw" while it was being repaired over at the Alabama?

A. Yes, sir.

Q. And how those blocks were roved and reroved under Mr. Benson's instructions?

202 A. Yes, sir.

Q. Were you paid at that time?

A. Yes, sir.

Q. How much were you paid?

A. Five dollars a day.

Q. Were you expecting pay the morning that you were over there, the morning you were hurt?

A. Yes; sure.

Q. Was there anything said about your doing that work for nothing?

A. No. After we were through with Captain Roberts' barge then I went to work for Captain Benson again and worked a day or two. It took us about two days to raise Captain Borey Roberts' barge away from that Southern slip; about two days, and that time I didn't get my pay for that from Benson and then I was through with that and of course I was working then for Benson right along doing his work.

Q. You moved that boiler for the Mobile & Gulf Navigation Company after you got through with the "Apollo"?

A. Yes, sir.

Q. And Mr. Benson paid you?

A. He was paying me right along.

Q. And you went over to Henderson's and started raising Benson's other barge?

A. Yes, sir.

Q. And he was paying you right along?

A. Yes, sir.

Q. And he was paying you at the Alabama?

A. Yes, sir; except one thing—when I was doing Charley Benson's work there was one week I didn't go to the office and get the pay and I figured that would pay up for the time I was using this barge at the Southern docks and after that I went and got my pay right along but there was one week that I gave him services for the use of his derrick but there was three or four or maybe five weeks that I was paid after that.

203 Examination by Mr. KILBORN:

Q. When the barge was up at Chickasaw it was doing digging work?

A. It had to dig itself its way out.

Q. It wasn't listing but was doing digging work?

A. Yes, sir.

Q. And you got a contract did you not, to do some work over on the S.S. "*Apollo*" for her owners?

A. That was long before that work.

Q. But you had a job over there on the "*Apollo*"?

A. A long time before that.

Q. And you had borrowed Captain Beauregard Roberts' derrick barge from him to do what work with?

A. Yes, I had his derrick to do that work with.

Q. Without any pay; you were not paying him for the use of that boat were you?

A. Well, that was between him and I. I paid him in a way.

Q. You had his derrick and it sunk at the Southern dry docks slip?

A. Yes, sir; it did.

Q. Then didn't you and Mr. Benson and Captain Beauregard Roberts have a conversation down here in Bienville Square when you wanted to get Mr. Benson's derrick barge that had been working at Chickasaw for the purpose of using it in raising Captain Beauregard Roberts' sunken barge? Did you have that conversation in Bienville Square with Mr. Benson?

A. The first thing that Borey told me about it is that Benson is going to let me have the derrick for a day or two.

Q. Then you met Mr. Benson in Bienville Square didn't you?

A. Yes, sir.

Q. And talked to him about that?

A. I don't know what we talked about, but we met there and what the conversation was I really don't know.

Q. Was there anything said in that conversation about your using his barge, the "Chickasaw"?

204 A. No, I don't think so.

Q. When and where did you make the arrangements with Mr. Charley Benson whereby you could use his barge, the "Chickasaw," in raising Captain Roberts barge?

A. Captain Borey Roberts' was the first one that told me about that. Charley is going to let us have his barge a day or two is what he said.

Q. Where was that?

A. I think he told me that at his own house.

Q. Then when did you see Mr. Benson about it?

A. Well, I don't know.

Q. Can't you tell us where you saw him?

A. I saw Benson right along nearly every day.

Q. Where did you talk to Mr. Benson about using his derrick barge in raising the Roberts barge?

A. I really don't know. I seen Charley Benson pretty nearly every day.

Q. In that conversation in Bienville Square on one Saturday night—didn't you see Mr. Benson with Captain Roberts and didn't Mr. Benson agree there in that conversation on a Saturday night in Bienville Square that you could have the use of that barge and didn't you tell him that you would only want it a couple of days for that purpose?

A. I don't know. I don't remember that.

Q. Do you deny that that happened?

A. I know that we were together in the square but what conversation it was I don't know.

Q. Was it about the barge?

A. I don't think so. I don't know what it was.

Q. Your mind is a complete blank on that subject?

A. On that subject it is a blank.

Q. On what arrangement did you have the use of Mr. Benson's barge in raising the Roberts barge?

A. Captain Borey Roberts said that we could use it. Benson said he was going to have his barge one or two days.

Q. That was for your own purposes that you were using it?

205 A. For Borey's just as well.

Q. For you and Borey in raising his barge?

A. Yes, sir.

Q. And previous to that he had let you have the barge for use in the "Apollo" job?

A. What?

Q. Previous to that time Beaureguard Roberts had loaned you his barge?

A. Yes, sir.

Q. And it had sunk while in your possession had it?

A. Yes, sir; I had done got that work up a long time, about the "Apollo"; Borey Roberts' barge was in the slip and she was working for the Southern docks.

Q. It sunk while you had it didn't it?

A. I was operating his barge but Borey Roberts got paid for the Southern docks. He was supposed to get paid.

Q. It sunk while you had it on the "Apollo"?

A. Yes, sir. She was tied up there in the Southern docks and the barge was tied up in the Southern docks and there was a watchman there at night supposed to watch all those boats.

Q. But something did happen to her?

A. Yes, sir; she sunk there.

Q. And you had to get Mr. Benson's barge to raise it?

A. Well, I was undecided.

Q. Just answer the question, yes or no.

A. I was undecided which boat I was to get; Benson's or Murnan's and Borey Roberts says, We will get Benson's barge, so that was all right with me.

Q. Benson's barge on which you were working at Chickasaw had not been used up to that time for listing had it?

A. No, not for listing.

Q. And he had a new spool of this very heavy cable on board the barge, didn't he?

A. Yes, sir.

206 Q. And in order for you to use the barge in raising Captain Roberts' barge you had to rig the lists on the Benson barge didn't you, with new cable?

A. No, sir.

Q. You could not use it in the condition it was in, could you?

A. Yes, sir; I could. Captain Borey Roberts' barge was a small one, about as small as ever was in the river.

Q. What conversation did you have with Mr. Benson about using that new spool of cable?

A. Benson brought a new spool of cable on board, and said, Knudson, I want you to put on a new topping lift—that is to hold the boom up in the air. That is about five or six wires up there.

Q. You did that?

A. We did that at Chickasaw.

Q. I am not talking about what happened at Chickasaw. What conversation did you have with him about rigging up those blocks after that with this new spool of cable?

A. Then Charley says to me, we will have to reeve up that new wire. And I says, Yes, if you are going to do any heavy work in this river with it it is better to have the new fall than the old fall.

Q. Then you reeved it up?

A. Yes, sir.

Q. For the purpose of listing Beauregard Roberts' barge?

A. It wasn't for that purpose but it was for Harrison's purpose mostly, because I knew it was a heavy barge and that was the first work we done.

Q. You came down from Chickasaw for the purpose of listing Roberts' barge and that is the reason you brought it down there?

A. No, sir; it was not the reason. He wanted to get the barge down to Mobile from Chickasaw because it was inconvenient for everybody to go up there. He wanted to bring the barge down to Mobile.

207 Q. When you were over at the southern dry docks slip for the purpose of raising Beauregard Roberts' barge—wasn't it then that you cut this wire cable?

A. Yes, sir; so then Charley says to me——

Q. Never mind now, I will conduct the examination and you answer the question.

Mr. PHLANS. I think the witness has a right to proceed with his statement.

DEPUTY COMMISSIONER. He can explain his answer. He is not confined to yes or no.

Q. Mr. KILBORN. You cut the wire there at the Beauregard Roberts job?

A. Charley Benson insisted very much to put in the new wire. He insisted on that at Chickasaw. Well, we didn't put it in at Chickasaw. We were in such a hurry to get out of there and get away from there and I thought we could put it in at Mobile, and did at Mobile; and he said, Do you think that old wire will do all right to hold up the bucket? And I said, Yes, which it did; and he said, Well I got this new wire for the purpose of a new fall and a new topping lift.

Q. Did you ever get permission from Mr. Benson to cut that cable in the manner in which you did cut it, or instructions from him?

A. Yes, sir.

Q. To cut it like you did cut it?

A. I got permission to use my own judgment.

Q. After you had cut it, you contend that the first job that you did was to raise a barge for Harrison?

A. Yes, sir.

Q. And then that you went to work and did this Baker job?

A. Yes, sir.

Q. And then you did the Radcliffe job?

A. Yes, sir.

Q. And then you came back and lifted Borey Roberts' barge?

208 A. Yes, sir.

Q. That is what you contend?

A. Yes, sir.

Q. Did Charley Benson tell you you had no right to cut that cable and you did wrong, and he expected you to repair the damage?

A. No, sir.

Q. He never did tell you that?

A. No, sir.

Q. Never did fuss at you and tell you you had ruined a valuable cable and he expected you to repair it?

A. He said I cut it short.

Q. Didn't he tell you that you had practically ruined the cable that cost him about $500 and that he expected you to repair the damages?

A. No, sir; he said I cut it short, and I said, Charley, that cable can be spliced as good as it ever was, and I said, How do you want this; and he said, I want that block 15 feet in the water; and I said that would be too long; and I said, When a boom is up high, about ninety-five or as far as it would go, then if that block is rove up about three sheaves that is all you need, and then if it will go down 4 or 5 feet of the deck, that is all you need.

Q. When Mr. Benson talked to you about reeving up those blocks, how many sheaves did he tell you to reeve up?

A. He asked me would it be necessary to reeve up all the four sheaves.

Q. Didn't he tell you if you rove it up at all you must reeve it up four sheaves?

A. He asked me was it necessary to use all four sheaves, and I told him I didn't think it was necessary to use four sheaves.

Q. What did he say then?

A. He didn't say nothing.

Q. Now you were working on this barge up at Chickasaw for $5 a day?

A. Yes, sir.

Q. As a member of the crew of the barge?

209 A. Yes, sir.

Q. And you continued to work as a member of the crew at $5 a day until about fifteen days before you were hurt, didn't you? How many men were working on that barge from the time you were out at Chickasaw until the time you quit working on it?

A. About four men; three or four men.

Q. In what capacity were they working on there?
A. I don't know what they were getting.
Q. What were they doing?
A. Different kinds of work about the barge—general repair work.
Q. And operating the barge too?
A. No; we had one operator.
Q. When you went to do a job, how many men did you have working on the boat?
A. Three or four of us.
Q. You were engaged in operating the barge when she did the job at Harrison?
A. It was left with me and the engineer.
Q. You and the engineer operated the barge when she did the Harrison job?
A. Yes, sir; it was left with us.
Q. You and who else operated the barge when you did the Baker job?
A. The same operator, or engineer, and myself.
Q. And you would give instructions to him as to when to go ahead and operating the engine?
A. No; when we did the Baker's barge I took my orders from Baker and I gave my orders to the operator.
Q. When you went to Radcliff's you directed the operation of the barge at that time?
A. Well, I put the slings on and I told the operator, I am ready for you to go ahead; and he went ahead.
Q. You directed the manner in which the work should proceed?
A. He can direct that himself.
Q. Who did?
210 A. The operator. He was there to handle the boom and and the levers and all that.
Q. You were working with him on the job, in conjunction with him?
A. Yes, sir; in conjunction with him.
Q. When they put the barge over on the dry docks to have work done, you were clipping off rust and painting around like a sailor does on a boat?
A. I was working right along; general repair work; yes, sir.
Q. Sailors on boats generally do that kind of work, don't they?
A. I expect they do all the time; yes, sir.
Q. When they are not navigating they are busy clipping iron rust and painting?
A. Yes, sir.
Q. Did Benson agree to pay you?
A. Sure.
Q. Wait until I ask you the question. Did Benson agree to pay you anything if you would come back on the boat in July and splice this cable?
A. Benson knows I wasn't working for nothing.

Q. Answer the question, whether he agreed to pay you anything!
A. I would not work for nothing.
Q. Did you tell him that!
A. He knew it.
Q. How did he know it!
A. When a man puts me to work he expects to pay me.
Q. Do you expect that he expected to pay Borey Roberts for his work on that day!
A. As to transactions between them I don't know anything about it.
Q. You never did tell Mr. Benson that if you came back and spliced that wire that you would charge him for it!
A. He knew very well that I would not work for nothing and I could not live to work for nothing.
Q. And you infer from that that he knew you expected pay!
211 A. Sure.
Q. Do you know what Mr. Benson got for the use of that derrick barge on other peoples work!
A. No, sir.
Q. Do you know how much a day he would charge for it!
A. No sir.
Q. Have you any idea!
A. I could not say.
Q. Don't you know it would run up to a hundred dollars a day!
A. I could not say.
Q. You know what other people charge for the use of barges like that!
A. It depends upon what agreement you make.
Q. This is a right fine derrick barge!
A. It is a good barge.
Q. What is the reasonable value of that barge!
A. I do not know. I could not say.
Q. About how much!
A. I could not say.
Q. You have been working on the water all your life!
A. About fifteen or twenty thousand; fifteen thousand something like that.
Q. Don't you know what people ordinarily get for the use of a derrick barge like that!
A. Sometimes fifty dollars, sometimes twenty-five dollars, sometimes twenty-five dollars.
Q. Did you ever know anybody to use a barge like that for twenty-five dollars a day!
A. Yes, I had Towart's barge for twenty-five dollars a day.
Q. Is that the same kind of barge as this was it!

Q. It wasn't near as big as this?
A. It wasn't as big as this.
Q. How many days did you actually use Captain Benson's barge in raising Captain Roberts'?
A. Two days.
Q. And you say you worked one week for him and got no pay for it?
A. I worked one week to pay up for those days used of that barge.
Q. Did you tell Mr. Benson that?
A. No; I didn't tell him nothing about it. We just figured it out ourselves.
Q. Who did you figure it out with?
A. I didn't go up and claim nothing for it.
Q. You mean you didn't claim your wages?
A. When I came to the office after that, my check was there not for that week but the week I put in there.
Q. Did you tell Mr. Benson you were going to work a whole week for nothing for the use of the barge?
A. No, sir; I just gave him those few days.
Q. How many days.
A. About six days, I think.
Q. Did you tell him you were doing that?
A. Benson knew it.
Q. Did you tell him that?
A. No.
Q. Don't you know, as a matter of fact, you never did any such thing as work a week free of charge for the use of that barge?
A. I sure did.
Q. And never did tell him you were going to do it?
A. I never did go to the office.
Q. But you never did tell him that?
A. No; I never did go up there.
Q. And never did tell his young lay in the office about it?
A. No, sir; but the week after that I went up there and they gave me a check for that week.
Q. For what week?
A. You see I gave him one week and all the rest of the weeks I got it for.
Q. Did you tell the young lady that you were giving them a week?
A. No, sir.
Q. And didn't tell his bookkeeper?
A. No, sir.
Q. Or him either?
A. No, sir.
Q. Don't you know you went back there to collect that pay on the 1st of July out of a conscience that he had been good enough to let you have the barge and you owed him the debt to pay for repair [illegible] to any damage to the cable?

Q. He was contending that you damaged it?

A. He—if he was going to take it as damage he would have taken it out when I was working for him.

Q. Wasn't he contending that you had damaged his cable by cutting it like you did?

A. No, sir. Charley didn't know himself if it should be that way or longer, or the way I had it. He didn't know.

Q. Didn't you go there on the fourth of July with Mr. Beauregard Roberts and his man Lennis to repair that cable out of a conscience that you owed Mr. Benson the debt of fixing that cable or trying to because he had been good enough to loan you that barge to raise Captain Beauregard's barge?

A. No, sir.

Q. And how many days had it been that you worked for Mr. Benson before you got hurt; how many days had you been working for somebody else?

A. To my knowledge, I don't believe I was working for anybody else.

Q. You had been out of Mobile?

A. I went down the coast and stayed about three days and then I came to Mobile here and came back Saturday night and Monday morning Charley wanted me to put a splice in that wire for him.

Q. When was the last time you had made a day's work for Charley Benson before you got hurt?

A. I could not say when it was I quit Charley.

Q. You were hurt on July fourth, weren't you?

214 A. Yes, sir.

Q. Don't you know you were paid off on June 11th preceding the day you were hurt?

A. Yes, sir.

Q. And you had done nothing for Charley Benson between June 11th and the day you were hurt?

A. That is what I say, about two weeks.

Q. That you were idle?

A. Yes, sir; a little more than two weeks.

Q. Who was on that derrick barge with you when you cut this cable?

A. Smith, the operator, was there. I believe just him and I were there. I could not say if there was any others there, but I know us two were there.

The Deputy Commissioner:

Q. When were you born?

A. 1869.

Q. What month?

A. The 16th of April.

Mr. Chisman. How many feet of wire would the drum on the winch hold?

A. I really don't know how many feet it will hold. I really have the slightest idea.

(This witness was thereupon excused.)

Mr. GRESHAM. That is the claimant's case.

C. D. SMITH, a witness called by Mr. Kilborn, after having been first duly sworn by the deputy commissioner, testified as follows:

Examination by the DEPUTY COMMISSIONER:

Q. What is your name?

215 A. C. D. Smith.

Q. Where do you live?

A. 1710 Charleston.

Q. Mobile, Alabama?

A. Yes, sir.

Examination by Mr. KILBORN:

Q. Were you formerly employed by Mr. Charley Benson?

A. Yes, sir.

Q. In what capacity?

A. Engineer.

Q. Of what?

A. Of the derrick boat.

Q. The "Chickasaw"?

A. Yes, sir.

Q. Did you know Joe Knudsen?

A. Yes, sir.

Q. Was he employed also at the same time by Mr. Benson?

A. Yes, sir; he came there after I went there.

Q. In what capacity was he employed?

A. As rigger, I suppose, and general workman on that boat.

Q. Where was the boat when you and Knudsen were first working on it?

A. Chickasaw.

Q. What kind of work was it doing up there?

A. We were dredging out of Chickasabogue.

Q. Dredging a way out of there?

A. Yes, sir.

Q. Do you know whether Mr. Benson got any new spools of cable and put it on that boat?

A. Yes, sir.

Q. When was that?

A. I don't remember just the date, but it was before we got out of Chickasaw.

Q. Before you got out of Chickasaw?

A. Yes, sir; a good little bit.

Q. Did you rig any topping lift out of that new spool of cable?

A. Yes, sir.

Q. Did Mr. Benson give any instructions to Knudsen about any [illegible] of that cable or as to whether it was to be cut or not?

A. Yes, sir; he gave us orders about it.

Q. What did he say about it?

A. Well, we were there in Chickasaw. He told us while we were there that if we had to have a swing cable we could cut a short piece of swing cable, but he didn't want that cable cut; that he wanted it for a fall cable.

Q. Not to cut it except a small piece of swing cable?

A. Yes, sir.

Q. How much would that be?

A. If I remember right, it was eighty feet.

Q. After that did Mr. Knudsen borrow that derrick dredge for any purpose?

A. Yes, sir. We had it at the Southern shipyard up there.

Q. How did the derrick barge get from Chickasaw down to the shipyard?

A. Captain Roberts towed it down.

Q. Captain Beauregard Roberts?

A. Yes, sir.

Q. For what purpose did you go there?

A. We came down to pick up a derrick boat of Captain Roberts that was sunk.

Q. When you got there did Mr. Knudsen cut that cable?

A. Yes, sir.

Q. How did he cut it? In what operation did he cut it?

A. Well, we ran it through the sheaves and cut it with a cleaver.

Q. Did Mr. Benson give any instructions to do that in the way in which it was done?

A. No, sir; not as I know of.

Q. Was he there when it was cut?

217 A. No, sir.

Q. Who was there?

A. Mr. Knudsen and myself.

Q. Were the blocks reaved up after it was cut?

A. We had the blocks reaved on the docks out there and rode the cable over the boom and hooked it to the machine.

Q. Did that leave a great quantity of cable still on the spools?

A. Yes, sir. There was a good deal of the cable left on the spools.

Q. After you had cut the cable what did the derrick barge do?

A. We went down to Mr. Harrison's shipyards and picked up a boat down there, a sunken boat down there.

Q. Then what did it do?

A. We went back to the Southern and if I am not mistaken we pulled the cab off that derrick boat and taken the engine and the boiler off.

Q. Off of Captain Beauregard Roberts' derrick boat?

A. Yes, sir. And then we went and taken a boat up for Belle Sand and Gravel Company.

Q. Then what did you do?

A. We carried that down to Harrison's yard and when we got through with that job we went back to the Southern yard and picked up Captain Roberts' boat.

J.

Q. Captain Beauregard Roberts' sunken boat?

A. Yes, sir.

Q. How many days in all was the barge being used in working Captain Beauregard Roberts' sunken barge, in taking the engines off and the cab and raising it?

A. Well, I could not say just exactly what time we put in on that boat, but we were there and doing those other jobs about ten or eleven days, all told.

Q. Out of the ten or eleven days, how many days, to the best of your recollection, was devoted to raising Captain Roberts' boat?

218 A. I could not say, exactly, but we were three days on those other two jobs and then reaving the cable—about seven or eight days.

Q. You were seven or eight days on the Roberts job?

A. We were up there that time, but I don't know.

Mr. PILLANS. I understood the witness to say, probably erroneously, that he was seven or eight days.

Mr. KILBORN. How many days were you reaving the cable?

A. Just part of one day on that.

Q. How many days—how many—I don't mean the exact number of days, but your best recollection—were you engaged in working on the Roberts job; was it more than two days?

A. Yes, sir.

Q. How much more than two days were you there?

A. That is a pretty hard question to answer because we were there and it has been a long while since we done that work and it is pretty hard to say what time we did work on it. It is a pretty hard question to answer just how much time we did put exactly on the job, you see; but I would say that we were at this place, outside of this other work, something like seven or seven and a half days that we were up there outside of this Baker and Harrison work.

Q. You were seven days at the Southern and three or four days on the other jobs?

A. Yes, sir.

Q. While you were lying at the Southern were you busy pretty much all the time with the Roberts' work?

A. Mr. Knudsen was getting his slings around the boat and getting ready to pick it up.

219 Q. It took him some time to get his sling and riggings around and get the boat up?

A. Yes, sir.

Q. And what assistance did you have up there doing the Roberts job?

A. Well, we had one man there I think about one day or maybe two days.

Q. During the time you were on the Roberts job who paid your wages?

A. When we were on the Roberts job?

Q. Yes.

A. Mr. Benson.

Q. During that whole period of ten or eleven days who paid your wages?

A. Mr. Benson.

Q. Did anyone ever pay you anything and did Knudsen ever pay you anything?

A. No, sir; I was working for Mr. Benson under a salary.

Q. How much?

A. $150.00.

Q. A month?

A. Yes, sir.

Q. Did anybody there other than Benson pay you for any time you put in while the Roberts barge was being raised?

A. No, sir.

Q. You got all your money from Mr. Benson?

A. Yes, sir.

Q. Captain Roberts and Mr. Knudsen paid you nothing whatever?

A. No, sir.

Q. Did you ever hear Mr. Benson get in behind Mr. Knudsen about having cut this cable?

A. Yes, sir; they were saying something about it down at Henderson's yards.

Q. Did Mr. Benson tell him he should not have cut it?

Mr. GRESHAM. We object to his leading the witness.

220 Q. Well, what did he say about it having been cut?

A. I didn't hear the whole conversation but he told Mr. Knudsen that he had ruined the cable by cutting it in two. He could not reach down in a ship with it in that condition, and Mr. Knudsen said "If you think it is too short I will splice it."

Q. How long did you continue to work for Mr. Benson after that? Were you working for him when Knudsen was hurt?

A. No, sir; I think I left the employment of Mr. Benson something like the 26th of June, or somewhere along there.

Q. You worked for him until about that time?

A. Yes, sir.

Q. After the Roberts job was completed, did Knudsen continue to work for Benson?

A. Yes, sir; he worked on several days after that.

Q. In what capacity; what was he doing?

A. Well, it was general work then. We were overhauling, more than anything else; cleaning up and scraping the iron and painting, and so on.

Examination by Mr. GRESHAM:

Q. As I understand it, the conversation you had with Mr. Benson when the barge was at Chickasaw—Mr. Benson said he could cut a small piece of cable for a swing cable?

A. Yes, sir.

Q. And he wanted to use the rest for a fall?
A. Yes, sir.
Q. A fall is the wire rope that leads from the drum to the head of the boom and then through a block down there, to raise the load?
A. Yes, sir.
Q. And that is what the rest of the cable was used for?
A. Yes, sir.
Q. That is what you rigged the cable for, over at the Southern dry dock?
221 A. Yes, sir.
Q. Do you know anything about how much Mr. Benson got for raising the Baker derrick barge, Mr. Smith?
A. No, sir; I don't know anything about the agreement on the Baker job. The Baker job, you say?
Q. Yes, sir.
A. No, sir; I don't know how much he got on that job.
Q. Mr. Benson made that trade with the representatives of Baker?
A. Yes, sir; Mr. Benson handled the business end of it altogether.
Q. And that is also true with regard to Mr. Harrison's barge?
A. Yes, sir.
Q. That block was a four-sheave block that you all reaved?
A. Yes, sir.
Q. That barge of Baker's that you got up was also a derrick barge sunk in the river?
A. Yes, sir.
Q. It was a pretty heavy barge?
A. Yes, sir; I guess that barge—it would come something like thirty-five or thirty-six or maybe thirty-eight tons, with the water in it.
Q. Did you have any trouble? Did your fall break, or have any trouble raising it?
A. No, sir.
Q. Did you have any trouble raising Mr. Harrison's barge?
A. No, sir.
Q. And both the Baker barge and the Harrison barge were raised after you all rigged this new fall?
A. Yes, sir. The Harrison job was heavier than the Baker job.
Q. Did it tip the barge any in raising it?
A. Well, it pulled her down—I can't say exactly how low.
222 Q. But the weight did pull the head of the barge down?
A. Yes, sir; it pulled the head of the barge down.
Q. But you had no trouble with your fall, did you?
A. No, sir.

Examination by Mr. KILBORN:

Q. Was the fall rigged long enough to go down in the hold of a vessel, the way Mr. Knudsen rigged it?
A. It would go in the hold, but not to the bottom of the ship.

Q. Had Mr. Benson given any instructions about rigging it long enough?

A. He said he wanted it to reach down to where he could take machinery, or anything, out of the bottom of the ship.

Q. Was it rigged that way, the way Knudsen had rigged it?

A. Well, you would have had to boom down mighty low.

Examination by Mr. GRESHAM:

Q. How many feet were left on that reel? You said a good many feet.

A. Several hundred feet. I don't know. I would say a few hundred feet, but I could not say how much.

Q. Is there any wear on that fall on the drum of the winch when it is in use on the drum?

A. How is that?

Q. When a fall is rove over the drum of a winch, like on that barge, and it is run back and forth, is there any wear on it?

A. Yes; there is a wear to it.

Q. Now, as you understand it, Mr. Benson wanted it rove so that he could lift heavy machinery from a dock onto the ship, or from a ship onto the dock?

223 A. Yes, sir.

Q. How much further down would that fall have had to go to have gotten to the bottom of the ship? About ten or fifteen feet?

A. Something like that. Of course, I can't say, because I don't know anything about ship work.

Q. It was about ten or fifteen feet short, according to Mr. Benson's claim, is that right?

A. Yes, sir.

Q. And that is all?

A. Yes, sir.

Examination by Mr. KRAEGER:

Q. Was it long enough to reeve a six sheave block, the way Knudsen fixed it?

A. No; not the way he fixed it. We only had three turns through a four sheave block.

Q. The way he fixed it was it long enough to reeve a four sheave block?

A. No, sir; not to reach down.

Q. How much short was it to reeve a four sheave block that way?

A. 192 feet.

Q. In other words, you had a four sheave block on there and Knudsen rigged it only three sheave?

A. Yes, sir.

Q. And if he had rigged it four sheaves, it would have been 192 feet of being long enough to reach out down to the hold of the ship?

A. Yes, sir; to my judgment. Oh, no; that was to come down to where we left it at, from where it hangs out through three sheaves.

Q. How many sheaves was rigged, the way Knudsen rigged it?

A. Three.

Q. And, if he had rigged it four sheaves would it have come down to the deck, the way he cut it?

A. No; that would have made it still shorter. The fall is 96 feet and the sheave is off the deck, something like four feet.

Q. So it takes twice ninety-six?

A. It takes twice the ninety-six to come on down and make another turn.

Q. And it would have been how much shorter on a four sheave?

A. It would have been 192 feet to reeve the four sheave to come down to leave it hanging the way it was.

Q. It was way too short for a four sheave purpose?

A. Yes, sir.

Examination by Mr. GRESHAM:

Q. The object of having more than one sheave is simply to give greater lifting power?

A. Yes, sir.

Q. Now, rove through those three sheave, you had plenty of power to lift anything down there you had to lift, as far as the fall was concerned and even tip the boat into the water?

A. Yes, sir.

Q. Did it seem to you, proper, at that time, to reeve that fall through only three sheaves and to save the rest of that wire?

A. Under the consideration of the power, the three sheaves was enough, but under the consideration of speed, they should have had four sheaves. A four sheave turn would gear you down slower.

Q. The more sheaves on the block the slower the weight goes down?

A. Yes, sir.

Q. And the less sheaves there are, the quicker you can handle it?

A. Yes, sir.

Q. Are there two drums there?

A. Yes, sir.

Q. A great deal of fall around that drum, and there would have been some interference with that other drum in coming back over and winding it around the drum?

A. Yes, sir; it would let the topping-lift cable drag on your lower drum cable.

Q. And in doing that you were trying to cut the cable—when [illegible] and you cut that cable you tried to cut it to the length it seemed to you, at that time best, taking the size of the drum and being in contact with that topping lift, you cut the cable at the [illegible] you thought it would be better cut?

A. Yes, sir.

Examination by Mr. KILBORN:

Q. Did you have any discussion with Knudsen at the time he was cutting it?

A. Yes, sir; I told him it was too short at the time he cut it and he lengthened out on it and put more on it.

Q. He put more on it?

A. Yes, sir.

Q. What did you say to him then?

A. I didn't have nothing to say to him, because I wasn't cutting the cable.

Examination by Mr. GRESHAM:

Q. You thought it was all right after he lengthened it out; it seemed to you about right then?

A. As far as that cable cutting is concerned, that wasn't under my charge at all. I was running the engine.

Q. You were running the engine?

A. Yes, sir.

(This witness was thereupon excused, and the hearing of testimony was recessed for lunch, to be resumed at 2 o'clock p. m.)

NOTE.—The hearing was reconvened at two o'clock p. m., November 22nd, 1928.

226 Mr. KILBORN. If the court please, I had a couple questions that I would like to ask Captain Knudsen on cross-examination, that I overlooked.

DEPUTY COMMISSIONER. Mr. Knudsen recalled.

Captain JOE B. KNUDSEN, on being recalled by Mr. Kilborn, testified as follows:

Examination continued by Mr. KILBORN:

Q. Mr. Knudsen, in raising of the Roberts' barge, did you first take the cabin off?

A. We did; yes, sir.

Q. How much time was consumed in fastening onto and raising the cabin off of it?

A. That did not take so much time.

Q. About how long; about how many days?

A. It was not a day.

Q. It was not a whole day?

A. No, sir.

Q. How much time was consumed in taking the engine off?

A. We took the cabin off in a couple lifts, and the engine, I took the boiler with one lift and the engine with the other lift.

Q. How many days in all were consumed in lifting the cabin and the engine?

A. We spent one day there, fooling around with them, just about one day.

Q. How many days were you laying there, getting your wires onto the barge itself; that is, Captain Roberts' barge, and in lifting that barge?

A. It was a small barge.

Q. I mean, derrick.

A. I just fastened a wire around the barge, two wires, one wire went around from the stern and one from the back, and we did
227 it all in one day. I was there, myself, early in the morning before the others came, and that was the day we raised it.

Q. Weren't you there, really, as Mr. Smith says, quite a number of days prior to doing that work and doing it?

A. The way that came in, when we came in there to the end of the dock we laid there fixing up different things and fixing rigging onto the new fall and one thing and another. Then they called us off to Harrison Brothers' boat. Then we went down there and then we towed back up into the slip again. Then we fooled around there to get ready. By the time we got ready to do some work they then came for us again. That is what took the time—coming and going to do other work.

Q. How many days did you consume in this Roberts job, preparing for it and doing it?

A. The actual time was about two days, doing that work.

Q. You lost some time preparing for the job, didn't you?

A. That is what I mean—preparing to do it—they took us away from the job and we went back again when we had nothing else to do.

Q. About the Harrison job; you did not know anything about that until after you had gotten rigged for the raising of Roberts' barge?

A. Yes; the Harrison job came on unexpectedly. I knew about the Harrison job just as I went to the Southern slip; I believe, a few days before we got there.

Q. Who paid Mr. Smith, the engineer for his work on the days you were working on the Roberts job?

A. I did not pay him anything at all. I had one man and I paid him myself.

Q. What other help did you have besides the engineer?

A. Just only one man, I think.

Q. But you never loaned Mr. Benson any money for what he paid him, did you?

A. No; I did not loan him anything. I just put in a week's work for me, work and expense for six days, to pay for that.

Q. You paid him nothing for the engineer?

A. No, sir.

Q. You did not have any money with which to pay him, did you?

A. Well, it was not in question for me to pay him.

Q. Have you any property?

A. No, sir.

Q. Nothing whatever?

A. No, sir; I have got no property.

Q. No money and no income from any source?

A. No.

Q. You testified that you came down here from the marine hospital this morning.

A. Yes, sir.

Q. You are able to walk without much effort, and get around?

A. If I do not walk too much, I can take my time and walk from here to the hospital.

Q. Did you walk from here to the hospital this morning?

A. Oh, by taking my time.

Q. Haven't you been walking around a good deal?

A. No, sir. I have got to lay-up if I walk much, as I am so sore the next day that I have to lay-up.

Q. You are able to get around and do some kind of work now, aren't you?

A. I do not see how I could unless I set down and used my hands. I will never be able to stand to do work and walk around—to do that kind of work—in the condition I am in.

Q. Do you expect to walk back to the hospital this afternoon?

A. I think I am going on the car. I do not think I will be able to walk, and I will get on the car, because I have been fooling around here all day and I have pains in both places now.

220 Q. The injuries you sustained are altogether in your right leg?

A. Yes, sir.

Q. Your body and your left leg has not been effected at all?

A. No; the left leg was not [illegible].

Q. Your body is all right, there is nothing wrong with you there?

A. No, sir.

Q. It is simply confined to your right leg?

A. Yes, sir; and the doctor says it will never be any better than it is now.

Examination by Mr. GRESHAM:

Q. You walked down from the marine hospital this morning because you didn't have any funds and you wanted to be in court here to-day?

A. Yes, sir; that is why. If I had carfare I would have went on the car, but I just had it to do.

Q. Did Mr. Benson ever call on you for any money for the use of that barge, with reference to the "Apollo"?

A. Not the "Apollo."

Q. Captain Roberts' barge?

A. Yes, sir.

Q. Now, this derrick barge "Chickasaw," did you see that barge yesterday?

A. Yes, sir.

Q. Tell his honor how that is rigged?

A. I managed to go to the docks yesterday, to the Alabama plant, who are using that barge.

Q. Who are the Alabama people?

A. The Alabama Dry Dock people.

Q. Are they one of the largest dry dock people on the Gulf coast?

A. Yes, sir.

Q. And they were using that barge?

A. Yes. I got one of the engineers and talked to him and asked him if he was operating on this barge, and he said yes——

230 Mr. KILBORN. I object to any conversation between the engineer and Mr. Knudsen, on the ground that it is hearsay; on the further ground that the barge is no longer the property of Mr. Benson; and further that nothing that Alabama company is doing with the barge now shade on the issues in this case.

Mr. PILLANS. If your honor please, we do not want to bring that conversation in at all. We expect to show this—that the barge is now rigged exactly as Mr. Knudsen had it rigged.

Mr. KILBORN. I still renew my objection and I contend that that does not throw any light on the issues in this case at all.

DEPUTY COMMISSIONER. They are going to show that this barge at the Alabama company is equipped in the same way as the barge was equipped when he got here on it; is that the idea?

Mr. GRESHAM. Yes, sir; that is the same barge—and we want to show that it is now rigged for heavy work, at one of the largest ship repairing yards on the Gulf, and that it is rigged as Captain Knudsen had it.

The DEPUTY COMMISSIONER. That is all right; but any conversation on this subject is irrelevant.

Mr. KILBORN. I except to your honor's ruling.

Q. Tell his honor how it was rigged?

A. She was roved into three sheaves—standing part is made fast to the boom block, or lower block. That makes seven parts. That is the way I had it.

Mr. KILBORN. I move to exclude that testimony as irrelevant, incompetent, and immaterial, and upon the further ground that it does not throw any light on the issues in this case.

The DEPUTY COMMISSIONER. Objection overruled.

231 Mr. KILBORN. I except to your honor's ruling.

Q. What sort of work was the derrick "Chickasaw" doing at the Alabama Dry Docks Company?

A. It was doing ships work, marine work. It had a ship's propeller—she had a ship's shaft, a shaft that connects from the main engine to the propeller, raised up in the air on one end, and they had the propeller lying on the wharf, and were trying to fit the end of that shaft into the propeller.

Q. Is that heavy work or light work?

A. That is very heavy work.

Q. Now, I want to ask you this: I do not know whether the record shows it clearly, but I want to ask it again; when you got through

rigging that derrick boom with that new wire; when the derrick was straight up in an upright position where was the lower block?

A. It was about that high [indicating] from the deck.

Q. About three and a half feet?

A. Yes, sir; that high from the deck.

Q. Now, how does the lower block make connection with the thing that the derrick is to lift?

A. As a rule they have got two slings, a chain sling, which connects on to that bottom block, and that chain sling is a wire, a wire sling, whatever you chose to use, and you connect that on to what you are going to lift.

Q. How long is that chain?

A. It all depends on what you want to use, and is from ten, twelve, to twenty feet, depending on what you are lifting and how far away it is.

Q. With the derrick in that position, straight up, and the block three and a half feet from the deck, how was the wire with reference to the drum, the other end of it?

A. How much wire I had on the drum?

Q. Yes. Did you have any turns around the drum?

282 A. I had three turns around the drum.

Q. With the derrick rigged in that fashion, would you be able to lift anything out of a ship or from the ship to the wharf?

A. Yes; I would. When you go alongside of a ship with any kind of a weight, say this [indicating] is the boom, you have to move that boom over like that [indicating].

Q. That is an angle of about what?

A. About thirty-five degrees, I presume, or forty-five, I reckon.

Q. Forty-five degrees from the horizontal?

A. Yes; in that shape [indicating] to get the block over the hatch of the ship, the fall, you know, over the hatch of the ship that you are going to lower down into, and when you do that, that throws that fall about fifteen feet more, maybe more——

Q. Below the level of the barge?

A. Below the level of the barge; yes, sir; having your boom down like that [indicating].

Q. Then you have got your chain about how long——

A. Then you *you* got your chain probably twenty or eighteen feet, something like that, whatever you choose——

Examination by Mr. KILBORN:

Q. You say you walked down to the docks yesterday?

A. I got on the car and went down.

Q. You had to walk how far after you got off the car?

A. I got a transfer, you know, on that other car, and that took me about two blocks of the docks.

Q. How did you get back?

A. I got back the same way. I walked about two blocks and I got on the car and came back up.

Q. Do you go down there right frequently to the docks?

233 A. That is my first time I have been there for a long, long time.

Q. On the day you got here you did not see Mr. Benson and talk to him, did you?

A. No, sir.

Q. You did not see him any time since the time that you have been hurt, have you?

A. No, sir; I did not see him.

Examination by Mr. GRESHAM:

Q. Have you ever seen Mr. Benson since the time you were hurt until you seen him in court here to-day?

A. No, sir; this is the first time I have seen Mr. Benson since I was hurt.

(The witness was thereupon excused.)

The DEPUTY COMMISSIONER. Mr. Knudsen, you say you have not seen Mr. Benson since you got hurt—have you been communicating with him by letter?

Mr. KNUDSEN. I got one letter from Mr. Benson.

Mr. GRESHAM. Did Mr. Benson ever call on you when you were out at the hospital since you got hurt?

Mr. KNUDSEN. No, sir.

FLOYD LENNIS, on being called as a witness by Mr. Kilborn, and being first duly sworn by the deputy commissioner, testified as follows:

Direct examination by Mr. KILBORN:

The DEPUTY COMMISSIONER. Where do you live?

234 A. Right at present in Mobile.

Mr. KILBORN. Do you remember the occasion when Mr. Knudsen here was hurt, on July the 4th, 1927, down on Mr. Charlie Benson's barge "Chickasaw"?

A. Yes, sir; I was there.

Q. Who were you working for at the time?

A. I was working for Captain Roberts.

Q. Captain Beauregard Roberts?

A. Yes.

Q. I will ask you whether or not, prior to the time that Mr. Knudsen was hurt on the day he was hurt, or within a short while before that, you saw Mr. Knudsen that day?

A. Yes, sir; he was on the barge working with us.

Q. I mean before that; did he come down to the tugboat where you were working?

A. Yes, sir; several times he came down there, three or four days before, or sometime before that.

Q. Just a short while before he was hurt?

A. Yes, sir.

Q. Was Captain Beauregard Roberts with him when he was down there on the tugboat?

A. Captain Roberts was on the boat; on the tugboat "Sister."

Q. That was Captain Roberts' boat?

A. Yes, sir.

Q. You and Captain Roberts were there and Mr. Knudsen came down?

A. Mr. Knudsen came down on the wharf.

Q. Right alongside the tugboat?

A. Yes, sir.

Q. Was there any conversation had between Mr. Knudsen and Captain Roberts in regard to Knudsen splicing a wire on Benson's derrick barge?

A. Captain Roberts had told Mr. Knudsen that he had to splice that wire for Mr. Benson, that he had to cut, because Mr. Benson had something for his barge to do.

235 Q. You say Captain Roberts told Mr. Knudsen that he had to splice that wire?

A. Yes, sir; and he said he had cut it. He said, "You have got to go over there and splice it."

Q. What did Knudsen say about that?

A. He said that he would.

Q. Then, on this morning when he got hurt, what happened? When did you first see Knudsen and where?

A. He was aboard the derrick when I got there.

Q. Aboard Mr. Benson's derrick barge?

A. Yes, sir.

Q. Where did you meet Captain Roberts that day?

A. That day, Captain Roberts, July the 4th, he came down to the tug "Sister" to get me and then we went down to Mr. Benson's job, and from there Captain Roberts and this young fellow that runs the engine——

Q. Jerry Woolsey, the engineer?

A. Yes, sir; went across from Mr. Benson's place over to the derrick barge.

Q. As I understand, you were on the tugboat "Sister," a boat that belonged to Captain Roberts?

A. Yes, sir.

Q. And Captain Roberts came to get you and you went on up to Mr. Benson's job, you and Jerry Woolsey, an engineer of Mr. Benson's?

A. Yes, sir.

Q. You went across the river?

A. Yes, sir.

Q. And when you got there did you find Joe Knudsen already there?

A. Yes, sir; he was already on the derrick barge when we got there.

Q. What did you do after you got there?

A. Right then we had some coal on the barge and we put that from the derrick barge over onto a little barge. Then I got monkey-

ing around there with some wires and things and had them fix them up.

Q. Who directed the movements of the job preparatory to splicing the wire?

236 A. Captain Roberts would tell me something to do and sometimes Mr. Joe Knudsen would tell me what to do.

Q. What was the engineer doing?

A. He was monkeying around there, fooling with his engine about that time.

Q. Did you see Mr. Knudsen when he got hurt?

A. Yes, sir; I was looking right at him.

Q. Tell the court how it happened.

A. Mr. Knudsen started to put some lines ashore, to make fast to things, and Captain Roberts told him, he said, "Joe, don't tie those lines or make those lines fast because they are not going to hold; they are all rotten." It looked like Mr. Knudsen never paid any attention to him at all but kept going ahead and working and made them fast to the wharf. I do not know what he made them fast to on the wharf, because I was not on the wharf and I did not see what place he made them fast. After he got everything ready, I was helping around there slacking off lines and things, and when he got ready to swing this barge around where he could put the boom on the dock so he could lower away to splice the cable, I got back from off the front of the barge and went by the main cabin in the back, because I knew something was going to happen.

Q. Could you see Knudsen from where you were standing?

A. Yes, sir.

Q. What happened then?

A. He told Jerry, the engineer, to boom over a little; I guess that is all he said, like that; and Jerry moved that boom possibly three or four feet—the boom—and he stopped, and just about the time he stopped the engine Mr. Knudsen hollered, "Stop her, stop her," but Jerry had the engine stopped already, and the weight of those blocks and chains on that thing, fastened on to that rope which was tied on to the other stringers on the wharf, pulled that whole stringer out and it came down like this [indicating] over on the barge and

237 hit the tow bitt on the barge, and in some way or another Mr. Joe got tangled up in the rope, and when it hit it throwed him and tripped him up.

Q. You say that the boy had already had the engine stopped and the weight of those heavy blocks and things swung it over?

A. Yes, sir; and pulled that stringer off. The engine was stopped.

Q. Who were you working for there on that day and at that time?

A. I was working for Captain Roberts.

Q. Did Mr. Benson employ you?

A. No, sir. I had not spoken to Mr. Benson in a long time.

Q. Did Captain Roberts pay you for your work?

A. Yes, sir. I had never worked for Mr. Benson, at any time.

Q. On this previous occasion, when you say Captain Roberts told Mr. Knudsen that he had promised to splice that wire, what did Knudsen say?

A. He said he would. I do not remember whether he said tomorrow, or what day he would do it, but that he would go over there and splice it.

Mr. KILBORN. That is all.

Mr. GRESHAM. No questions.

(The witness was thereupon excused.)

Mr. J. E. WOOLSEY, a witness called by Mr. Kilborn, on being first duly sworn by the deputy commissioner, testified as follows:

Direct examination by Mr. KILBORN:

The DEPUTY COMMISSIONER. Give the reporter your name and address.

The WITNESS. No. 1417 *Washington* Ave., Mobile, Alabama, Box No. 557.

238 Q. Your name is Jerry Woolsey?

A. Yes, sir.

Q. Do you remember the occasion on July the 4th, 1927, when Mr. Knudsen was hurt?

A. Yes, sir.

Q. Who were you working for at the time?

A. I was working for Mr. Charles Benson.

Q. Mr. Charles Benson; this gentleman here?

A. Yes, sir.

Q. In what capacity?

A. As engineer on a derrick barge.

Q. As engineer on the derrick barge "Chickasaw"?

A. Yes, sir.

Q. When did you first see Mr. Knudsen that morning?

A. When I left the ship I seen him over the river, on the barge.

Q. You saw him when you got across the river, on the barge?

A. Yes, sir.

Q. And that was the first time you had seen him that day?

A. Yes, sir.

Q. Who did you come across the river with?

A. With Captain Beauregard Roberts and Lennis.

Q. Mr. Lennis, the gentleman who just preceded you as a witness?

A. Yes, sir.

Q. Where did you go then?

A. To Mr. Benson's job.

Q. Did you hear any conversation between Mr. Benson and Captain Roberts that morning, in regard to what was to be done?

A. No, sir; only he told me the day before, he was going to splice——

Mr. PHILANS. I object to any conversation.

Mr. KILBORN. I withdraw the question.

Q. Anyhow, when you crossed the river with Mr. Beauregard Roberts and Mr. Lennis you found Mr. Knudsen already there?

A. Yes, sir.

Q. What did Mr. Knudsen say about it when you got on the derrick barge?

A. He wanted to turn the barge and lay the boom down, so he could reach the cable to splice it.

Q. What did you do?

A. I was busy oiling the engine and getting it ready to go.

Q. Oiling up the engine and getting steam up on that barge?

A. Yes, sir.

Q. Tell the court how Mr. Knudsen got hurt?

A. He wanted to turn the barge around on the end. He asked me to boom over to starboard, which I did.

Q. Who asked you to boom over to starboard?

A. Mr. Knudsen. And I boomed over to starboard and went back and continued oiling up my engine, and I seen Mr. Knudsen with a manilla rope, not exceeding one and a half inches in diameter, about one and a quarter to one and a half inches, and he was making that line fast to the wharf. I did not see what it was at the time, and making it fast onto the block on the main fall.

Q. How much do those blocks weigh?

A. I do not remember.

Q. You know approximately how much they weigh, don't you?

A. They are very heavy blocks, though.

Q. Can you give the court any idea what those blocks will weigh?

A. No, sir; but I judge around three or four hundred pounds.

Q. That is the block, without any tackle or stuff on it?

A. Yes, sir.

Q. What happened after he fastened onto the wharf?

A. He came back on the tug and flagged me to boom over a little to start the barge to swing around on the end, which I did. I boomed over not exceeding four feet.

Q. Fast or slow?

A. Slow, and stopped.

Q. Did he signal you to stop?

A. No, sir; not at that time, he did not, but I stopped, because I knew the weight of the block and all was going to have too much force to it, and I stopped, and the weight of the block swung the boom around and struck that piece of timber on the wharf and knocked it down, and it caught the tow bitt forward and the hull of the A frame.

Q. What happened then?

A. Mr. Knudsen, in some way, got tangled up in the rope, and he got his leg broken when that timber was pulled out from the dock and fell on the tow bitt.

Q. And that is the way he was hurt?

A. Yes, sir.

Q. Did you keep your engines going ahead after he signaled you to stop?

A. No, sir; I did not. I stopped them before he gave me the signal.

Q. And you say it was the weight of the tackle that swung that boom across there?

A. Yes, sir.

Cross-examination by Mr. GRESHAM:

Q. You worked on the derrick barge for the Baker Sand and Gravel Company, as engineer, also?

A. Yes, sir.

Q. That was the same barge that was sunk up the river a good while ago?

A. Yes, sir.

Q. Tell the court about what size barge that is.

A. The barge of Baker's?

Q. Yes.

241 Mr. KILBORN. Mr. Gresham, do you mean the barge of Mr. Baker or the barge of Mr. Benson?

Mr. GRESHAM. Baker's barge.

Q. Would that derrick barge weigh as much as seventy five or a hundred tons?

A. No, sir; not that large, that barge would not.

Q. How much would it weigh?

A. The boom on it would not stand that. It would not stand fifteen tons. Just a straight cypress boom, that barge of Baker's was.

Mr. PILLANS. No; he is asking you about the weight of Baker's barge; how much would it weigh?

The WITNESS. I do not know.

Mr. GRESHAM. How much would it weigh, how much would the whole thing weigh, do you think?

A. I could not say.

Q. Did Mr. Benson ever have that fall spliced after Mr. Knudsen was hurt?

A. Yes, sir; it was spliced.

Q. That same day?

A. No, sir.

Q. A day or two later?

A. Yes, sir.

Q. Who did that work?

A. A man by the name of Mike. I do not know his last name.

Q. Is that gentleman out here to-day?

A. No, sir.

Q. Mr. Swigary?

A. No, sir.

Mr. GRESHAM. That is all.

(The witness was thereupon excused.)

242 Mr. CHARLES BENSON, a witness called by Mr. Kilborn, on being first duly sworn by the deputy commissioner, testified as follows:

Examination by Mr. KILBORN:

The DEPUTY COMMISSIONER. Give the reporter your name and address.

A. Charles Benson, 1101 Savannah Street, Mobile, Alabama.

The DEPUTY COMMISSIONER. You are the defendant in this case?

A. Yes, sir.

The DEPUTY COMMISSIONER. What connection has this Benson Sheet Iron and Metal Works got to do with you? Is that a fictitious name, or partnership, or corporation, or what is it?

A. I own the place; I am the proprietor of the place.

The DEPUTY COMMISSIONER. You are the sole proprietor and operator, under that name?

A. Yes, sir.

(NOTE.—The examination was thereupon continued by Mr. Kilborn.)

Q. You say you did business under the name of the Benson Sheet Iron and Metal Works?

A. Yes, sir.

Q. Anybody interested in it with you?

A. No, sir.

Q. You owned this derrick barge "Chickasaw" we have been talking about?

A. Yes, sir.

Q. That was your individual property?

A. Yes, sir.

Q. What has been your line of business all of your life?

243 A. Sheet iron and copper work.

Q. Ship worker?

A. Coppersmith by trade.

Q. You worked up from the ranks as a sheet iron worker?

A. Yes, sir.

Q. And as blacksmith?

A. Sheet-iron, copper worker; that is a little different from blacksmithing.

Q. I mean you have worked as a laborer in that line of work; worked yourself up until you became proprietor of this little shop?

A. Yes, sir.

Q. You have done this line of work all of your life?

A. Yes, sir.

Q. Have you worked around these derrick barges and things like that yourself?

A. No; very little.

Q. How long did you own this derrick barge "Chickasaw"?

A. About three or four months.

Q. You bought her from the Chickasaw Ship Building and [illegible] Company?

A. Yes, sir; or the Tennessee Coal and Iron Company it was.

Q. She was up there at the Chickasaw Company's plant, up here above Mobile somewhere?

A. Yes, sir.

Q. Did Mr. Knudsen work for you on that barge?

A. Yes, sir.

Q. In what capacity?

A. Well, he was a rigger and deck hand.

Q. What kind of work was that barge doing up at Chickasaw?

A. When they built Chickasaw they had this barge, this dredge boat, up there doing dredging work; and when they built the embankment around that place, they left an embankment about fifteen or twenty feet high, and when I bought the dredge "Chickasaw" I had to dig out of that embankment to get it out into Chickasaw Creek.

Q. In other words, she dug herself out, really?

A. Yes, sir.

Q. And you had Mr. Knudsen working on her while that was going on?

A. Yes, sir; that is, the latter part of it he was on there. The first part of it he was not, but the latter part Joe was on there.

Q. Mr. Knudsen was on there as a rigger and deck hand at that time?

A. Yes, sir.

Q. He was a general handy man on the boat?

A. Yes, sir.

Q. Do you know Captain Beauregard Roberts?

A. Yes, sir. I have known Captain Roberts a long time.

Q. How about Mr. Knudsen; did you know him?

A. I have known Joe about fifteen years.

Q. Were you friendly with him?

A. Yes, sir.

Q. Did Captain Beauregard Roberts have a derrick barge?

A. Yes, sir.

Q. When your boat was up at Chickasaw, where was Captain Beauregard Roberts' barge?

A. I saw Captain Roberts' barge over there a few days before it was sunk. I was over there with Mr. Pillans' father, and Mr. Pillans remarked about the condition of the barge at that time and he said he could not understand what kept the boat from sinking.

Q. That was this Mr. Pillans, here?

A. No; his father. Mr. Pillans and I both looked at it, and he laughed and said he could not see what kept the boat afloat. When he came out, I told Luster Bodden he had better have that barge moved—or you are going to have another one at the bottom of

245 the slip. They already had the "Apollo" sunk in the slip. And sure enough, a few days after that, a northerner came up and sunk his barge.

Q. Did you have any connection with Captain Roberts in the ownership of that boat?

A. No, sir. His boat sunk in such a place that it was impossible to operate into that slip from the river, with the barge sunk like she was.

Q. Did Captain Roberts and Mr. Knudsen ask about using your derrick barge, so that he could raise his sunken barge?

A. Captain Roberts never said anything to me about it at first, but Joe talked to me and he said that they had Captain Roberts worried almost to death about it, as he had that slip bottled up with his sunken barge, and that they were talking about all kinds of damage, which he was going to be responsible for, and that he did not know what he was going to do about it.

Q. You say Joe, you mean Mr. Knudsen, the claimant?

A. Yes, sir.

Q. You say Joe spoke to you and told you that Captain Roberts was worried?

A. Yes, sir. The last time I went up there, went up to that fill to that derrick barge, she was afloat——

Q. That is up to Chickasaw?

A. Yes, sir; and Mr. McArdle, who is with the Tennessee Coal and Iron Company——

Q. First, I will ask you before you go ahead with your explanation—what connection had Mr. Knudsen with the sinking of Captain Roberts' barge over there?

A. Well, Joe was using Captain Roberts' barge to raise the old "Apollo" that was sunk over there.

Q. Did Mr. Knudsen have a ship of his own to work on the "Apollo"?

A. He had a contract to raise her.

Q. You had no connection with Mr. Knudsen in that contract?

A. No, sir.

Q. You had no interest in it whatever?

246 A. No, sir.

Q. That was a contract Mr. Knudsen had of his own for the raising of the "Apollo"?

A. Yes, sir. They were working it together, he and Captain Roberts, I understand.

Q. You understand he and Captain Roberts had that contract between them?

A. Yes, sir; and Joe was to do the work.

Q. And it was while Joe was using Captain Roberts's barge on the "Apollo" job that she sunk?

Q. They had to use it in raising Captain Roberts' dredge?

A. Yes, sir. They could not raise it any other way, because the dredge was rigged just like the barge that went down. They had to put it on there; otherwise they could not rig it otherwise.

Q. Did you ever tell him how many sheaves to rig the block for when he went to rig it?

A. I told him that we had operated the barge with seven sheave blocks, and I told him that I wanted it rigged with four sheave blocks to go twenty feet under the water, which would allow you to go down in a ship and pick up anything.

Q. Why did you tell him to rig it four sheaves instead of three?

A. Because the work that he was going to do was very heavy work and was really more than a four-sheave rig was capable of handling safely. The safe working strain is eight tons.

Q. If it is rigged with two sheaves or three sheaves, is the strain on the cable greater than if it is rigged with four sheaves?

A. Greater, because you have got another turn on it.

Q. A great deal greater?

A. Yes, sir.

Q. You told him how you wanted him to rig it, and that you wanted it rigged with four sheaves?

A. Yes, sir; and that we had enough wire left on there to rig four sheaves twenty feet, which would allow the block to go twenty feet below the surface of the water. That is why I bought three thousand feet of wire at that time. You see, if I had wanted it rigged three sheaves I would not have had to have bought three thousand feet of wire.

Q. How did Mr. Knudsen rig it, and how did he cut it.

250. A. When they brought the dredge down to the Southern dry dock, they just cut it in two; that is all they done, right about the middle. They put about nine hundred feet on there, after I had told them that I did not want my cable cut, for I did not think that the cable would be safe to use with a splice in it, as it would not be smooth enough to reave properly, and I told him, "Do not cut my cable." Knudsen said that there would be too much on it for the drum to go around the drum. After Joe had cut it I saw him, and I told him that he did not have enough left on there for a four-sheave block, and he said, "Yes; I have"; and I told him, "No; you have not; you have not got enough on there for a three-sheave block." They testified that they rigged it with a three-sheave block, but it was not. They rigged it two sheaves for a two-sheave block.

Q. What did he have to say about it when you told him that he had wrongfully cut your wire?

A. Well, he said, "You have enough left for a four-sheave block and to go twenty feet under the water with it rigged that way," and I told him I did not have.

Q. Was there anything said about splicing it?

A. No; not at that time. He said he could splice it, but he never did. He said he could, but he never did splice it.

Q. Now, when your derrick barge got down to the Southern dry dock, there on the job of raising Captain Roberts' derrick barge, did you get a job at that time from Harrison Brothers?

A. No, sir.

Q. When did you get the Harrison job?

A. Harrison sent—Harrison came down to my shop and I was not there. When he came he said to me, "I seen your derrick barge down at the Southern dry dock raising that barge of Captain Roberts'," and I said, "Yes; I have loaned it to Captain Roberts to raise his derrick," and he says, "I have got that barge that
251 sank right at our ways, the Harrison Brothers ways." And he said that it was in the way of his ways and he would like for me to come down and raise it, and I says, when you get ready to have it done, tell Joe and he will come down and raise it for you. The next day John Harrison came down there again, and he says, "How about getting that derrick to-morrow." I says, go and tell Joe Knudsen and he will bring it down and raise that for you. So we raised the barge the next day. That was several days after they got down to the Southern dry docks.

Q. How many days did Knudsen and Roberts have your derrick barge, using it for their own purposes?

A. They had it there, altogether, eleven days. We had it one day for the Harrison job and two days on the job for the Baker Sand and Gravel Company.

Q. How about the Radcliff job? Tell his honor about the Radcliff job.

A. That day I was going over the river, which was the last day Joe was over there. I went over there to the Southern dry docks and there was nobody but Knudsen on the job. I says, "Joe, what is the matter? Haven't you got anybody to help you here?" and he says, "Sure, we have a couple of men to help us." So I got ready to go back across the river, as Captain Roberts was not there. Jim Campbell, a ship carpenter, was there, and I says, "Have you seen Captain Roberts?" He says, "I think he will be here directly." He says, "I think he will be back in about five minutes." I said to Jim, after I had waited there for thirty-five minutes, to tell Captain Roberts that I came over there to see him, and to tell him that I wanted the barge to stay over there after he got through as I wanted to have her caulked. The boat has been there for ten days at that time and they had not done anything but to take the house and boiler off of her. Next morning, about eight o'clock, I went and got a launch and went back there, and when I got back over there Captain Roberts and Joe and a couple men were there working with him.

Q. Working there raising Captain Roberts' barge?

252 A. Yes, sir; getting ready, getting lines around her, and getting things ready. And so I said to Captain Roberts that Herndon Radcliff had told me he had two tanks he wanted to lift overboard out of a gravel barge, which he wanted to use to clean gravel in. Herndon had told me that morning that any time I didn't have anything for my boat to do that he would send one of his tugs for my derrick so that I could lift those two tanks overboard for him, and I said I would be glad to do it. So I said to Joe, when I was over there, I says, "Joe, Herndon Radcliff will want a couple tanks lifted overboard and we will leave it there when we get back," but I said, "Joe, whatever you do don't move this barge away from here until I tell you." That is what I wanted to do. The barge had been leaking badly and came very near sinking right before that, and Smith, he had to go overboard and nail some batten over the leaky places in order to stop the leaks enough to put the barge in the Southern dry dock, and she was badly in need of caulking.

Q. What I want to get at is this: During this time that Knudsen had the barge over there how many days did he devote to your work and how many days to his work of raising Captain Roberts' barge?

A. He devoted two days to Captain Baker's work and he devoted one day to Harrison's work; that is three days from the total number of days he had the derrick barge there.

Q. He had it eleven days and eight days of it was devoted to his own use?

A. Yes, sir; because when he took the barge he did not use it only to lift the barge with, but he used it to carry the cabin or the house off of the barge with and to get the boiler and the engine out of the sunken barge, and he did all of that while he had the derrick there.

Q. Now, did you ever receive any compensation, in any form, from Captain Roberts or Knudsen for the use of your derrick boat?

A. No, sir; none whatever. I did not expect any.

253 Q. You just let them have it out of friendship for them?

A. Yes, sir.

Q. What is the value of the use of your dredge barge per day?

A. The minimum charge would be $75.00 a day—anywhere from $75.00 to $150.00 a day.

Q. A minimum charge of $75.00 a day?

A. Yes, sir.

Q. Now, during the time that Knudsen was employed on the barge and had it over there on the Roberts job, who paid the engineer?

A. I did.

Q. How much?

A. I paid him $30.00 for his week's work.

Q. You paid him so much a month?

A. I paid him by the week; $30.00 a week.

Q. Did Knudsen or Roberts ever refund you any part of the engineer's wages?

A. Knudsen told Smith he was his employee, and Smith told Knudsen he would rather have me pay him and just to make it all right with me. I never said anything to them, but I went on and paid it to Smith, and paid Knudsen, too, while he was working on his work.

Q. Paid both of them while he was using your barge for his purposes?

A. I paid him because he was right hard up, and I also paid him out of my own pocket, and there is the check to show it.

Q. About splicing this wire: Under what circumstances did Knudsen come over there the day he was hurt to splice the wire?

A. I rang up Captain Roberts at the city docks. Mr. Bell went and called him to the city docks, and I told Captain Roberts to come down to the job, and he came down and I asked him, "What are you going to do about my wire?" He started arguing a little about the wire and he told me he thought possibly that——

254 Mr. GRESHAM. I do not think that the conversation between the witness and Captain Roberts is relevant to the issues in this case, and I think it is purely heresay. Captain Roberts is not a party to this suit and has nothing to do with it.

Mr. KILBORN. My contention is that this wire was to be spliced by Mr. Knudsen, under directions from Captain Roberts, and that we never employed Mr. Knudsen to do the splicing at all. We expect to show by Mr. Benson that he got in behind Captain Roberts about it and that Mr. Roberts got Mr. Knudsen to do this work, and I think that is admissible.

Mr. GRESHAM. If your honor please, I do not agree to the gentleman's contention. Captain Roberts is not a defendant in this suit. He is not a party to this record, and what Captain Roberts told Mr. Benson, and what Mr. Benson told Captain Roberts, is purely heresay to the issues in this case.

Mr. KILBORN. It is in contradiction to the witness's story as he told it from the witness stand.

The DEPUTY COMMISSIONER. I think the proposition would be relevant if Mr. Knudsen was claiming that he made a contract with Benson. Benson claims he did not make any agreement at all with Knudsen; that he made some agreement with some other party, and I will allow that conversation in to show what that agreement with the other party was. I overrule the objection.

Mr. PILLANS. But this part was that Mr. Kilborn asked Mr. Benson to state the conversation or agreement that he had with Captain Roberts. That is the part I am objecting to. Captain Roberts is not a party to this suit.

Mr. KILBORN. That is only a part of the proving of this point. I can not prove it all at one time.

255 Mr. GRESHAM. Ask what the contract was between them. I think the conversation between Captain Roberts and Mr. Benson is heresay and irrelevant to the issues in this particular suit.

The COMMISSIONER. Of course, any conversation between Roberts and Benson would not be binding upon Knudsen, and is hearsay, and hearsay is admissible before this court, and I will let it in for what it is worth.

Q. All right; go ahead now.

A. How is that?

Q. You said you called up Captain Roberts.

A. I phoned Captain Roberts to come to my job, which he did. I asked him what he was going to do about my wire. He contended that it was a safe proposition to splice it. I had talked to Swigary and different people about splicing wire cable of this kind, where it goes through a sheave and a block, and they stated that the wire is liable to wear at that point where it is spliced, due to the fact that that portion of the cable is larger than the balance, and that it is a dangerous proposition to splice cable, where it goes through a sheave and block. It is all right on a straight pull. He said he had pieces of wire which had been in use for five years which had been spliced and that he considered it safe to splice it like that. Well, one word brought on another, so I agreed to it. I said, "Who are you going to get to splice the wire." He told me he was going to get this Jamaican negro on the wharf. He said he did a lot of splicing around here. Next he told me, he says, "Joe is coming back from Pensacola to-day, and maybe I can get him to go over there to-morrow, or maybe I can get him to make the splice in that wire. That was all there was to it. Next morning when Captain Roberts came in the shop—I did not see Knudsen—he told me Knudsen had left Canal Street and went over the river to the boat. That is the last I seen of him.

Q. Did you ask him to get Knudsen, or did Roberts say he would get Knudsen?

256 A. No; I put it to him to get the wire spliced.

Q. You put it up to Roberts to get that wire spliced?

A. Yes, sir. I did not know Knudsen in it at all.

Q. Did you give Roberts to understand you held him responsible for what had happened to your wire?

A. I told him what I expected him to do and I asked him what he was going to do about it.

Mr. GRESHAM. I object to that as inadmissible.

Mr. KILBORN. I withdraw the question.

Q. Did you ever request Captain Roberts or anybody else to get in touch with Joe Knudsen and have him make that splice for you?

A. No, sir; I never did.

Q. Did you have a conversation at that time or about the time of July the 1st, or shortly prior thereto, with Joe Knudsen, in which you asked Knudsen to splice that wire?

A. No, sir.

Q. You say he told you he was going to get Knudsen?

A. Yes, sir.

Q. And splice that?

A. That was the third of July. He said he was going to take Joe over there the next morning and make him splice that wire.

Q. Did you tell Captain Roberts that you would pay for the splicing of the wire?

A. No, sir. What I ought to have done was to have made him pay me for the wire.

Q. Did you tell Knudsen you would pay him for splicing the wire?

A. No, sir. I never seen Knudsen, and never spoke to him since he left the boat, about June 11th or 12th.

Q. When did Knudsen cease to work for you?

257 A. About June the 11th, I think. I have got a memorandum there. You can see it there. It is according to my pay roll.

Q. Is that what your pay roll shows?

A. Yes, sir.

Q. When Knudsen was working for you, up to June the 11th, what did you pay him?

A. Five dollars a day.

Q. At the time of this accident, were you carrying any insurance under the United States longshoremen and harbor workers act, to provide compensation to anyone who might be injured?

A. No, sir.

Q. Had no insurance whatever?

A. No, sir.

Q. Did you know anything about any such act being in existence at that time?

Mr. GRESHAM. I object to that. He is wandering far afield, in asking as to whether the gentleman knew anything about a law which he is supposed or presumed to know.

Mr. KILBORN. I withdraw the question.

The DEPUTY COMMISSIONER. Do you carry insurance now?

A. I have nobody working for me, at all.

The DEPUTY COMMISSIONER. Have you had anybody working for you since July the 1st, 1928?

A. No, sir; not after you got me up in court there, that day, I have had nobody working for me at all.

Mr. KILBORN. You mean, after this suit was brought—you mean the time the judge here, came down to the courthouse, where you were serving as a juror and called you out and talked to you about this insurance proposition?

A. Yes, sir.

Mr. KILBORN. And called you outside and told you of the necessity of having insurance?

A. Yes, sir.

258 The DEPUTY COMMISSIONER. That was a long time afterwards, when I saw you over there at the courthouse and advised you in regard to this insurance; that was a long time after July the 1st, 1928?

A. Yes, sir; that was a long time after that.

The DEPUTY COMMISSIONER. You say you have not had any employees since that time I saw you in the courthouse, over there?

A. No, sir.

The DEPUTY COMMISSIONER. How about the time prior to that time and after July the 1st, 1928?

A. I have been doing very little work, mighty little, just what I do myself, that is all; no mechanics employed at all.

Mr. KILBORN. You mean you do the labor?

A. Yes, sir; just a little shop around there.

Q. Put on your overalls and get a hammer and do the work yourself?

A. Yes, sir.

Q. You just operate a small shop?

A. Yes, sir.

Q. This block with these sheaves in it, these rollers in it, that hangs over the lift, approximately what will that weigh?

A. It will weigh about three hundred and fifty to four hundred pounds. They are very heavy blocks, they are four-sheave blocks. I had two six-sheaves, but I did not use them. I did not put them on.

Q. They will weigh how much?

A. Three hundred and fifty to four hundred pounds.

Q. In rigging up a four-sheave block, how much will your derrick barge lift?

A. Fifty tons.

Q. How much will it lift with three sheaves?

A. Well, you could lift fifty tons with three sheaves.

259 Q. But what was the advantage of rigging four sheaves over three sheaves? In other words, what is the advantage of rigging four sheaves as against three sheaves?

A. If you have got heavy work to do, heavy lifting, and you put a four-sheave in, it will releave the strain on the wire and relieve the strain all around; less strain on the engine. You take a piece of wire, a seven-eighth inch cable, and you can lift about twenty tons with four sheaves, for that will give you a working load of eight tons.

Q. Are you familiar with stresses and strains on wire cable used in the manner this was?

A. Yes, sir.

Q. Was Mr. Knudsen employed by you in any capacity whatever at the time he was injured?

A. No, sir.

Q. Had he been since June the 11th, 1927?

A. No, sir; he had had not.

Q. I believe you stated you did not expect to pay him for what he was doing on July the 4th.

A. I had nothing in the world to do with Joe Knudsen when Joe Knudsen got hurt. Captain Roberts telephone me at the shop and he says, "Charlie, I had an accident over there." He says, "Joe got his leg broke." I says, "Captain, I am sorry he got hurt." He says, "Will you come right down there?" I says, "Captain, I have

no interest in Joe Knudsen whatever." I was not interested in him, whether he broke his leg or not. I told him I was sorry that he broke his leg, but I had no interest in Joe Knudsen.

The DEPUTY COMMISSIONER. Did you know that Joe Knudsen was working on the barge at the time?

A. I knew he was, by heresay. I knew Captain Roberts was going to take him over there. Captain Roberts told me he was going to take him over there and get him to splice the wire, because it
260 takes a pretty good man to make a splice of that kind, and it takes a man who knows the splicing business from bottom to top, for you have to tuck in the ends about eight inches, and you have to know your business to keep down the size of the cable where it is spliced.

The DEPUTY COMMISSIONER. When did you say you had this conversation with Captain Roberts, in which Captain Roberts said he would get Knudsen to go over there and fix that wire?

A. About two days before he went. He went over there on the Fourth of July, and about the second of July Captain Roberts told me he was going to have him do the work.

Cross-examination by Mr. GRESHAM:

Q. How much did you get for raising the Baker barge?

A. $150.00.

Q. How much did you get for the Harrison job?

A. $75.00.

Q. How much did you get from Herndon Radcliff?

A. $25.00.

Q. What did you do with the barge after Mr. Knudsen was hurt?

A. Well, the barge still stayed over there, and about a week afterwards I hired Mike Swigary to go over there and rig her. She had never been rigged up.

Q. What was done with her? Didn't you hire her out to the dry docks?

A. No, sir. Mr. Bell got married and went away and when he came back off of his honeymoon he got pneumonia and then they had to send him to North Carolina.

Q. For what purpose did you purchase this derrick barge?

A. Just to use it to do lifting with.

Q. For such things as raising sunken barges?

261 A. Yes, sir.

Q. I believe you testified that you bought that fall when the derrick barge was in Chickasaw?

A. Yes, sir.

Q. You bought it up there for the purpose of having a part of it used as a fall, didn't you?

A. Yes, sir.

Q. Do you mean to tell that that wire was rigged on that barge solely for the purpose of raising Captain Roberts's barge?

A. They had it on there for that purpose.

Q. You mean you did not have anything to do with that?

A. I had nothing to do with that wire cable in order to raise that barge, and Joe put it on the dredge and brought it down there for that purpose.

Q. Was it necessary to have that fall on there to raise the Harrison barge?

A. Yes, sir.

Q. And was it necessary to have that fall on there to raise the Baker barge?

A. Yes, sir.

Q. If Captain Roberts had not put that new fall on there, you would still have had to have had that new fall on there yourself?

A. Yes, sir; it would have to go on there.

Q. Do you know how many turns that drum would hold? Have you made a test of it, or do you know?

A. I know how many feet of wire you can get on there.

Q. How many?

A. You can get two thousand feet on that drum.

Q. And operate it regularly without any trouble?

A. Yes, sir.

Q. How many feet is on it now, do you know?

A. They have about two thousand feet on it, that is, including that which goes through the sheave.

Q. Where is it now? Have you sold it, or did you sell it?

262 A. It is at the Alabama.

Q. Have you sold it?

A. Yes, sir.

Q. And, as I understand it, you have had nobody working for you at all since July the 1st, 1928?

A. No, sir; I have got nobody, except off and on I have had a helper or something like that, but that is all.

The DEPUTY COMMISSIONER. And what were they doing?

A. Sir?

The DEPUTY COMMISSIONER. These helpers you say you had, what were they doing?

A. Helping braze and generally helping me around the shop and on the job.

The DEPUTY COMMISSIONER. Any of these jobs on any ships?

A. I had one job on a ship and I had about six or eight or ten men on there, the last two days on there. That was shortly afterwards. That was about three months ago or four months.

Mr. GRESHAM (continuing). When did you sell that barge?

A. I can tell by looking at that memorandum that Mr. Kilborn has got there.

Q. Would you mind looking at it and telling us?

Mr. KILBORN. I submit that would not be evidence in this case, when he sold it.

Mr. GRESHAM. This is cross-examination, and as I understand it, counsel has a wide latitude on cross-examination, and I propose to show the relevancy of that.

Mr. KILBORN. In what respect?

Mr. GRESHAM. You will see.

The DEPUTY COMMISSIONER. I overrule the objection.

Mr. KILBORN. And I except.

263 Mr. KILBORN. Is this the one you want [handing the witness a paper]?

The WITNESS. Yes; I want to see the last pay roll. I can tell about that. [The witness examined the paper.] No; I can not tell from that. It must have been the latter part of August or the early part of September.

Q. Of 1927?

A. Yes, sir.

Q. I believe you testified that that fall was spliced after Mr. Knudsen was hurt?

A. Yes, sir; I had Mike Swigary to splice it.

Q. And this fall that so much has been testified about; have you sold that or is it on there now?

A. I do not know. I have not seen it.

Q. You sold it to the Alabama Dry Dock and Ship Building Company?

A. Yes, sir.

Q. They are ship-repair men on one of the largest ship-repair companies on the Gulf coast?

A. Yes, sir.

Q. They use her for lifting heavy objects in their business?

A. Yes, sir.

Q. Now, the barge was at the Southern slip when you first saw her after the new cable was rigged?

A. No, sir.

Q. The first time you saw her after she was rigged, where was she?

A. I noticed the wire at Henderson's. You see, when they raised that barge that night—they raised that barge at eight o'clock at night. Captain Roberts had steam up on his boat. I reckon he thought he could get everything through at once, and he rang me up down at the foot of Palmetto Street, where Herndon had these two tanks——

Q. Well, after those tanks were landed where was the barge taken?

A. Over to Henderson's.

264 Q. And where was it taken from Henderson's?

A. It stayed at Henderson's two days and went to the Alabama lower docks on the other side of the river and was hauled out to be caulked.

Q. How long did it take to repair her?

A. Altogether about three weeks.

Q. And had the repairs been finished when Mr. Knudsen was hurt?

A. No, sir; Joe was working for me when that sunk. He had finished raising the "Apollo" up and had his barge tied alongside of the wharf. He was working for me at that time.

Q. He had left Captain Roberts' derrick barge over there?

A. Yes, sir.

Q. All right. Did you have any agreement with Captain Roberts or Mr. Knudsen that they were going to use your dredge barge "Chickasaw"?

A. No, sir. The day that Mr. Jim McArdle advised me to leave the fill alone, that was Saturday. That night I telephoned to Joe and was told he was over to Captain Roberts' house, and I got him on the phone and I asked was Joe there, and he said he was. I said, "You and Joe come down to the square as soon as you can, as I want to see you for a few minutes." He says, "What part of the square?" and I told him the south isle, that I would be up in the south isle in about five minutes, and in about another five minutes Captain Roberts and Joe came there. I said, Captain, Joe tells me you are greatly worried about your boat over there, and that you wanted to get my barge to raise her up. "Yes," he said, "Charley, they have certainly got me worried to death about this, and I would sure like to get your derrick barge to help me out on this proposition." I said, "I will tell you, Mr. McArdle advised me to take that boat off the fill, and that I am going to do it, and if you will move her off of there I will let you use my boat to raise your barge."

247 Q. At the time you were talking to Captain Roberts, was Mr. Knudsen present?

A. Yes, sir; both of them. All three of us were sitting on a bench in the square. I said, "Joe, how long will it take you to raise that boat?" He says, "Not very long." I saw him around here at the Bottle House. The boom was put up and all; and I said, "Captain, go ahead and take her."

Q. Did you agree on any payment to you for the use of that barge?

A. No, sir; I just loaned it to him.

Q. As a friendly act?

A. Yes, sir.

Q. Then, after that, did Knudsen take that barge over there?

A. No; Roberts went up there and got her with his tug. He went up there Monday morning and towed her down there. That was Saturday night when I told him that, and Captain Roberts went up there Monday morning and towed my boat down to the Southern dry dock.

Q. And the Southern dry dock was the place where Captain Roberts' derrick was sunk?

A. Yes, sir.

Q. Now, in regard to this roll of cable, that we have been talking about in this case, what sort of cable was that?

A. A seventh-eighth inch plough wire.

Q. How many yards of cable was there in this roll?

A. Three thousand feet, before we cut it off for the topping lift. We cut off twelve hundred feet for the topping lift.

Q. Three thousand feet, originally, in this cable?

A. Yes, sir.

Q. And you cut off twelve hundred feet for the topping lift when you were at Chickasaw?

A. Yes, sir.

Q. And left the remaining eighteen hundred feet in the roll?

A. Yes, sir.

Q. What was the original cost of that three thousand feet of cable?

A. $537.00. I have the bill right here for it; three thousand feet, $537.00.

Q. When you permitted Mr. Knudsen and Captain Roberts to get your boat for the purpose of raising Captain Roberts' derrick, what, if anything, did you say to Mr. Knudsen about cutting the remainder of the cable left on the spool, that eighteen hundred feet?

A. I told Mr. Knudsen and Smith, both, that I wanted that cable left like it was, but they had broke the cable that goes around the bull wheel that swings the boom. They had broke that, and I told them that they could cut a piece off for the bull wheel, because we had about three hundred feet more of that than we needed for the boom block.

Q. How much was it that you took off for the bull wheel?

A. We took off about eighty-five feet for that.

Q. What did you say to them about cutting the remainder of it?

A. I did not want the remainder cut. I wanted it left exactly like it was.

Q. Did you tell them that?

A. That was understood.

Q. Did you tell Knudsen that?

A. That was understood, that I did not want that wire cut at all. I wanted to put it all on there. When I told Joe about that, he said it would be too much for the drum, etc., but I told him that was what I wanted done.

Q. When you told him you did not want it cut, he told you it would be too much for the drum?

A. Yes, sir; too much on the drum.

Q. What did you say to him about that?

A. I told him to leave the wire just like it was, and just cut off enough off the end of it for the bull wheel; that was all. You see, this wire was not on the dredge. This wire was sitting out on a lot of piling on a big spool near that dredge, and it was not found on the dredge boat, but when Joe brought the dredge down to raise Captain Roberts' dredge, he picked that up and put it on the dredge.

A. Yes, sir. The boat was then brought over on this side of the river after she was caulked and then moved around to the other side.

(The witness was thereupon excused.)

Mr. KILBORN. That is our case.

The DEPUTY COMMISSIONER. Any rebuttal?

Mr. GRESHAM. As I understand you, you want us to produce Dr. Hanaw. If you care to have him produced, I will try to get him.

The DEPUTY COMMISSIONER. What I said was he ought to be produced here in court; but if there was any reason why he should not be produced then we can go out to the hospital and take his testimony there, but I would prefer to have him here. We will recess until three-thirty (3:30) for Dr. Hanaw.

Dr. P. A. NEAL, a witness called in rebuttal by Mr. Gresham, on being first duly sworn by the deputy commissioner, testified as follows:

The DEPUTY COMMISSIONER. What is your business or profession?

Dr. NEAL. I am a physician of the United States Public Health Service.

The DEPUTY COMMISSIONER. From what institution did you graduate?

265 A. Vanderbilt University, Nashville, Tennessee.

The DEPUTY COMMISSIONER. What year?

A. 1927.

The DEPUTY COMMISSIONER. Are you licensed to practice medicine in the State of Alabama?

A. No, sir—I beg your pardon, I am not sure about that. I am in the regular service, and I do not know whether they allow us to practice here or not.

The DEPUTY COMMISSIONER. Did you have occasion to treat one J. B. Knudsen for an injury he sustained on July the fourth, 1927?

A. Yes, sir; I had him. I treated him from approximately August the 5th of this year up until the first of September.

The DEPUTY COMMISSIONER. Did you make a physical examination to find out what the injuries were?

A. Yes, sir.

The DEPUTY COMMISSIONER. When did you make that examination?

A. The first one I made was, I think, around the fifth of August.

The DEPUTY COMMISSIONER. What did you find on examination?

A. His heart and chest were approximately negative.

Mr. KILBORN. You mean by that, nothing wrong with them?

A. Best I remember; yes, sir; negative; nothing wrong with them.

The DEPUTY COMMISSIONER. What part of his body did you find something wrong with?

A. Right leg.

The DEPUTY COMMISSIONER. And what was the matter with his right leg?

A. Beginning with the right knee, was held in moderate flexation, deformity of approximately, best I could tell, 165 degrees.
266 His foot rotated externally—something like that—with fifteen to twenty degrees of motion; that is, in the right knee. The knee is partially ankylosed.

Mr. KILBORN. Are you looking at a report that you yourself made with somebody else?

A. I made this with Dr. Hanaw, both of us together. This is a report we made on the fifth of June, and we made another examination in August. Mr. Knudsen can tell you when it was.

The DEPUTY COMMISSIONER. Tell us all you found, with particular reference to his right leg.

A. Right knee quite tender to manipulation. The measurement of the right knee was 18⅛ inches; left knee 17¼ inches; 1¾ inches shortening on the right side. Some circulatory disturbance from arteriosclerosis; an old condition in the left foot present, with some deformity and the above circulatory disturbances; disability—this is the report of Dr. Hanaw, the specialist on physiotherapy and consulting specialist, at the hospital. That is where he figured out the disability on this man.

Mr. KILBORN. I object to the statement of what Dr. Hanaw figured out, because he is not present, and I would be deprived of any cross-examination of Dr. Hanaw.

The DEPUTY COMMISSIONER. Objection sustained.

Mr. GRESHAM. We except.

A (continued). The man who had been treating Mr. Knudsen, Dr. Hatfield, is off on vacation now, and it has been just since September that I attended him.

The DEPUTY COMMISSIONER. Were there any X rays taken of the right leg?

A. Yes, sir; numerous ones taken. Do you want a report on those?

267 The DEPUTY COMMISSIONER. Yes.

Mr. KILBORN. Mr. Gresham, the witness said something about a condition in his left foot. Do you contend that there was anything wrong with his left foot?

The DEPUTY COMMISSIONER. He testified his left foot was all right.

The DEPUTY COMMISSIONER. Have you got an X ray of his right femur?

A. Yes, sir. On August the 27th, 1927, here is a report on the X ray at that time. It is on the right knee and also third of the right femur. These films show the lower end of the femur in position, and the bone seems to have made very good repair. One small piece of bone is laying free, apparently under the patella, and may have to be removed.

The DEPUTY COMMISSIONER. Was that loose bone under the patella ever removed?

A. Just a minute and I will see. [The witness referring to report.] On October the 27th, 1927, incision over patella through a curved approach, supra and intra patella ligaments cut longitudinally, and capsule in same line over patella. Patella cut with hand saw and opened with a large penetcome. Wide attraction, with flexation of knee. Bone fragments removed, and area of callus obstruction cut away with chisel.

The DEPUTY COMMISSIONER. We are not so much interested in the treatment as we are as to what the condition was. Was this bone that you found a part of the patella that had broken off, or was it a part of the femur that was broken off?

A. This was October the 27th, 1927, and he has here—he does not state here whether that piece of the fragment was a piece of the fragment of the patella or not.

The DEPUTY COMMISSIONER. Did you find anything the matter with the femur? As I understand it, the femur is the big bone.

268 A. Yes, sir. The femur was the bone originally broken; then he had ankylosis of this joint, secondary.

The DEPUTY COMMISSIONER. He had a break of the right femur, did he?

A. Yes, sir.

The DEPUTY COMMISSIONER. What kind of a fracture? Doctor, I have before me a report which states: "Fracture, femur, right, supra-condylar, with posterior displacement and a vertical intra-condylar fracture also." What is supra-condylar?

A. Supra-condylar is the bony prominence that sticks out when the femur makes a curve like that [indicating]. You have got a curve like that, and that means the fracture was above the condylar.

The DEPUTY COMMISSIONER. Still it was a fracture of the femur, was it?

A. Yes, sir.

The DEPUTY COMMISSIONER. And not a fracture of the supra-condylar?

A. No, sir, the supra-condylar is just that proportion of the femur.

The DEPUTY COMMISSIONER. When was the last examination?

A. Do you mean from the standpoint of his knee alone?

The DEPUTY COMMISSIONER. Of his right knee and leg?

A. The last time here was on the 8th month 19th day, 1928. That is the last time I went over him. Of course, the doctor that has his ward now sees him each morning.

The DEPUTY COMMISSIONER. It states here there is a vertical intra-condylar fracture also. Was that also found by the X ray examination?

A. Here is the report on the X ray on July the Fourth, 1927.

Mr. KILBORN. I object to that report unless the doctor was present when it was made, or knows personally that it is accurate.

269 Mr. GRESHAM. Doctor, what you are reading from is a part of the permanent records of the United States Public Health Service at Mobile?

A. Yes, sir.

Mr. GRESHAM. You have those records in your hands now?

A. Yes, sir.

Mr. GRESHAM. And that is what you have been testifying to, and that is from what your statement is made?

A. Yes, sir.

Mr. KILBORN. Did you state that is a public record you are reading?

Mr. GRESHAM. I said a permanent record.

The WITNESS. May I make a statement?

The DEPUTY COMMISSIONER. Yes, sir.

The WITNESS. I have only been stationed at this hospital since July. They change us around frequently, and I do not think there is a single man in the service now that was there when this man came in, so I will have to take it from the records.

The DEPUTY COMMISSIONER. Those papers you have are the original record which you brought here from the hospital?

A. Yes, sir; these are the records of the hospital and this is a complete history of this man's case.

The DEPUTY COMMISSIONER. All right; read us what the X ray shows.

A. Intra-condylar fracture of the femur, with posterior displacement. The interval being rotated inward, the upper border of the patella appears somewhat impacted in the transverse line of fracture. The tibia and fibula are apparently impact.

The DEPUTY COMMISSIONER. Did you find any shortening of the leg?

A. Yes, sir; and on June the 5th they reported 1¾ inch shortening on the right side.

270 The DEPUTY COMMISSIONER. Now, doctor, taking what you found, and including the shortening of the leg, has there been, by reason of that, a total loss of use of that leg?

A. Not a total loss of use; no, sir; not in my opinion.

The DEPUTY COMMISSIONER. And is there a partial loss of use of the leg?

A. Yes, sir.

The DEPUTY COMMISSIONER. In your opinion, what is the proportion of that partial loss of use?

A. I think around between sixty or sixty-five per cent.

Mr. GRESHAM. That is permanent?

A. That is what this meant.

The DEPUTY COMMISSIONER. Is this condition permanent, the shortening of the right leg?

A. Yes, sir; that will be permanent.

The DEPUTY COMMISSIONER. That is permanent?

A. Permanent; yes, sir.

The DEPUTY COMMISSIONER. Is there anything about his right leg that won't be permanent?

A. I don't exactly get your question—you mean in the way of disability that will not be permanent?

The DEPUTY COMMISSIONER. I mean in the way of improvement.

A. The only chance for improvement would be, in my opinion, and I make this statement from the record of this man's case since he has been in the hospital and from my personal observation of him for the last fifteen or twenty days—would be that he might get some more flexation of his right knee, but I do not think it would be over five per cent.

The DEPUTY COMMISSIONER. When you say there is sixty-five per cent loss of the use of the leg, did you include that loss of flexation of the leg in addition to the shortening of the leg?

271 A. Yes, sir; the shortening is included, the contour of the leg is included, the function of his leg is also included; the function and contour of leg and the length of the leg, all of the disabilities that are present, are taken into consideration.

The DEPUTY COMMISSIONER. Is there anything to prevent a shoe being put on his leg so that he could walk along without limping?

A. A shoe could be placed on his foot but, in my opinion, that might improve his walking somewhat, but as far as getting around more easily is concerned, I do not think it would.

Examination by Mr. GRESHAM:

Q. As I understand it, doctor, this man's condition, of which you have testified to, is a permanent injury?

A. Yes, sir; it is permanent.

Q. And your opinion is that he has a permanent injury of about sixty-five per cent?

A. Approximately sixty-five per cent.

Q. Now, he is wearing a brace at this time, is he not?

A. Not to my knowledge, he is not, unless it has been put on since I saw him.

Q. Examine the brace, then, Doctor, and see if he has not a brace on now to brace and support the knee.

A. Yes, sir.

Cross-examination by Mr. KILBORN:

Q. As I understand it, Doctor, it is your judgment and opinion that this man has lost thus far somewhere between sixty and sixty-five per cent of the use of his right leg as a result of this injury?

A. That is my opinion.

272 Q. Now, isn't it also your opinion that this will probably decrease to some extent as the function is improved? In other words, will be reduced to some extent?

A. To a slight extent; yes.

Q. And that would run, as I understand you, about five per cent?

A. That is my personal opinion that that would be about five per cent.

Q. That was also Dr. Hanaw's opinion when he examined him, wasn't it?

A. I think it was at the time. We examined him since that and that report is on file, also.

Q. You figure this man, then, is only about forty per cent better off than the fellow who has got only one leg? Do you figure that that this man is only about forty per cent better off than a man that has not got a right leg at all, or do you figure he is a good deal better than if he had it cut off? In other words, this is what I mean: Do you think this man is only forty per cent off than a fellow with no right leg at all?

A. That is the way I figured it; yes, sir. Wait just a moment; I never looked at it that way. Yes; that is the way we have looked at it. He has got forty per cent use of that leg, I mean, approximately, roughly.

Q. You figure he is only forty per cent better off than a man with no right leg?

A. As far as the use is concerned, I think so.

The DEPUTY COMMISSIONER. Assuming that this condition has reached a permanent stage, and what I mean by permanent stage or permanent difficulty, is that the condition has reached that point where no medical treatment can improve the condition at all and the doctor discharges him as cured, as far as cure can be accomplished: Now, if, when he is so discharged, there is a permanent disability that will last as long as he lives—now, assuming that this condition has not yet reached a permanent stage, is it or is it
273 not your opinion that the condition that he is in now is temporary total or temporary partial, as far as wage-earning capacity is concerned? His occupation at the time of the injury was that of a rigger?

A. As far as this man's being able to resume his occupation as a rigger?

The DEPUTY COMMISSIONER. Yes.

A. In my opinion his disability is a complete disability in that regard. He is completely disabled from doing that kind of work.

The DEPUTY COMMISSIONER. Now, is he disabled from doing some other occupation other than that of a rigger?

A. He could be a night watchman or anything like that.

The DEPUTY COMMISSIONER. Is there any kind of work that he could do—if this man was to try to get out in the open labor market and try to get a job, what kind of a job could he hold, if he got one? Could he hold a watchman's job, catch rivets, or anything else?

A. In my opinion, he can not hold a job that requires very much walking. Of course, if he could obtain a position where he could sit down all the time, I do not see any reason why he could not do

that as well as anyone, but in my opinion he has a permanent disability of at least sixty per cent.

Mr. KILBORN. You mean of his right leg?

A. Yes, sir; of his right leg.

The DEPUTY COMMISSIONER. You mean that when a cure is accomplished, as far as a cure can be done, that he will have sixty per cent loss of use of his right leg?

A. Yes, sir; and it is the concensus of opinion of the hospital staff that the customary period of hospitalization has reached a conclusion.

The DEPUTY COMMISSIONER. In other words, they are getting ready to discharge him from the hospital?

274 A. Yes, sir.

The DEPUTY COMMISSIONER. That is all.

Mr. GRESHAM. There is nothing more you can do for him? He is just as cured as you can cure him?

A. Yes, sir; so far as treatment is concerned here, he is as nearly cured as he can be.

The DEPUTY COMMISSIONER. These questions Mr. Kilborn asked you about disability of forty per cent—your estimation of loss of use of the right leg was sixty-five per cent—that would be thirty-five per cent instead of forty per cent.

A. It was sixty to sixty-five. I said sixty to sixty-five per cent.

Mr. KILBORN. I thought, as I understood it, that you said somewhere between sixty and sixty-five per cent was about the radius of it.

A. That is about the radius of it, but I do not think it would reach less than sixty per cent disability.

Mr. KILBORN. In other words, this cure, when completed, would leave him with at least a sixty per cent disability of his right leg.

Mr. GRESHAM. Has there been any change in the recovery of loss of the use of his right leg between the last two examinations?

A. From the time I first went on duty there—I have forgotten the date—there has been practically no change whatever; practically none.

Mr. GRESHAM. It is purely speculative, isn't it, whether his right leg will get any better or not?

A. Absolutely all speculative.

The DEPUTY COMMISSIONER. Do you know what your rules are out there at the hospital in reference to a man coming out there for treatment? Suppose a man goes out there for treatment

275 and the hospital gives him treatment, thinking at the time that he comes under the Federal law entitling employees of the United States to medical treatment free of charge at the marine hospital, or a man gets injured and he is sent out to the marine hospital, and at that time the hospital assumes that it is not a compensation case, or not a case of this kind that we have right here, suppose it is found that the defendant in this case is liable for medi-

cal treatment rendered, is it the custom of the marine hospital to send him a bill in case the case is decided against the defendant?

A. You mean send the bill in to whom?

The DEPUTY COMMISSIONER. Send the bill in to the defendant in the case.

A. No, sir; my understanding of regulations of the marine hospital in that respect are, if a man off the street applies for treatment of an injury, he is given first aid, and then as soon as that is over he is sent to another hospital; any patient, unless he is a beneficiary of the service.

The DEPUTY COMMISSIONER. Then, as far as the marine hospital is concerned, in this case, the marine hospital has no charges to make against anyone?

A. No, sir; none whatever. As I take it, he is a merchant seaman.

Mr. KILBORN. So far as you know, your surgeons have determined that he is entitled to marine hospital treatment; is that it?

A. I know he is.

The DEPUTY COMMISSIONER. It is understood that an employee of the United States is entitled to free medical treatment at the marine hospital. Suppose it is found that Mr. Knudsen is not an employee of the United States, but that he was under the longshoremen's act and employee within the meaning of that act of Mr. Benson?

276 Mr. KILBORN. I object to that question as calling for the conclusion of the witness as to a matter of law.

The DEPUTY COMMISSIONER. I am asking him what his custom is out there. Doctor, do you know whether or not the hospital is going to present a bill for the services in this case?

A. This man is a merchant seaman and no bill will be presented to anyone. He is admitted here as a merchant seaman and after he is admitted as a merchant seaman—before we admit him the question of whether or not he is a merchant seaman is determined, and thereafter we do not have any comeback and we do not charge anything, of course. Well, for instance, we have this man off of the tug "Sister." That is our authority to admit him. We could not charge anything for these services then. That is, he is a beneficiary of the service, and, of course, no charge is made, like any other beneficiary. The hospital will make no charge to anybody in this case.

The DEPUTY COMMISSIONER. Is there anything further in this case?

Mr. KILBORN. That is all.

Mr. GRESHAM. That is all.

The DEPUTY COMMISSIONER. Do you gentlemen want to file any briefs?

Mr. KILBORN. I should like to.

Mr. GRESHAM. Yes, sir.

The DEPUTY COMMISSIONER. Ten, ten, and five. That means ten days for the opening brief, ten days for Mr. Kilborn to reply, and ten days for Mr. Gresham to reply to his reply brief.

Mr. GRESHAM. That is all right.

Mr. KILBORN. That is all right.

The DEPUTY COMMISSIONER. Briefs to be filed 10, 10, and 5—claimant to have opening brief; defendant to have ten days
277 to reply; and claimant to have five days to reply to Mr. Kilborn's reply brief. At the end of the time when said briefs are filed with the deputy commissioner, the case will be submitted, and the twenty days' time for him to draw up the compensation order in the case will commence at the time all briefs are in.

(NOTE.—The hearing was thereupon adjourned, and the court reporter requested to file his transcript within five days from date.)

[Reporter's certificates to foregoing omitted in printing.]

278 In United States District Court for the Southern District of Alabama

CHARLES BENSON, COMPLAINANT

vs.

LETUS N. CROWELL, DEPUTY COMMISSIONER, ET AL., RESPONDENTS

No. 2176, in admiralty

Final decree

Filed July 8, 1929

To the PRESENT AND PRESIDING THE HONORABLE ROBERT T. ERVIN, *Judge:*

This cause having been regularly set for trial, came on to be heard on the 3d day of July, 1929, all the parties being present in person and by attorney.

279 The respondent Crowell, on motion of the United States district attorney for the southern district of Alabama, and by leave of court, joined in and adopted the answer to the bill of complaint of the respondent Knudsen, and issue being joined, the complainant and the respondent Knudsen produced witnesses who testified orally in the presence of the court, and the respondent Crowell produced, offered, and filed in evidence the record of the proceedings before him as deputy commissioner but did not read same to the court, nor did the court read it; and the cause having been submitted by the advocates of the respective parties, and the same having been considered and understood by the court, upon a de novo hearing, and the court being of the opinion that complainant was not in fact the employer of the respondent Knudsen at the time of the latter's injury, and that the complainant Charles Benson should have decree in his favor, it is now therefore considered, ordered, adjudged, and decreed by the court and by the undersigned, as judge thereof, as follows:

1. That the respondent, J. B. Knudsen, was not in the employ of the complainant, Charles Benson, at the time of the injuries sustained by the said J. B. Knudsen on July 4th, 1927; and that the said J. B. Knudsen is not entitled on account of or for said injuries, to recover of the complainant, Charles Benson, any sum or sums by virture of the provisions of the longshoremen's and harbor workers' compensation act; and,

2. That the award of compensation in favor of the said J. B. Knudsen against the said Charles Benson, as made by the respondent Letus N. Crowell, deputy commissioner of the 7th compensation district, and filed by him in his office on December 26, 1928
280 (a copy of which award is attached as an exhibit to the orginal bill of complaint in this cause) is not in accordance with law; and,

3. That the said award is hereby in all things set aside, and the respondent J. B. Knudsen and the respondent Letus N. Crowell, as deputy commissioner in and for the 7th compensation district, shall be and they are both hereby restrained and forever enjoined from enforcing or attempting to enforce said award, or any part thereof; and,

4. That the claim of J. B. Knudsen against Charles Benson for compensation under the longshoremen's and harbor workers' compensation act, on account of the injuries alleged to have been suffered by said J. B. Knudsen on July 4th, 1927, shall be and it is hereby rejected and dismissed.

Each of the respondents, upon the rendition of the foregoing decree, reserved an exception thereto and to each paragraph thereof separately.

Done in term time this 3rd day of July, 1929.

ROBERT T. ERVIN,
Judge, United States District Court,
Southern District of Alabama.

281 In United States District Court

[Title omitted.]

Prayer for appeal by deputy commissioner

Filed Sept. 25, 1929

Now comes, Letus N. Crowell, as deputy commissioner, United States Employees' Compensation Commission for the seventh compensation district, one of the respondents in the above-styled cause, in his own proper person and by and through the United States attorney for the southern district of Alabama, considering himself, as such deputy commissioner, aggrieved by the final decree made and entered in the above-styled cause on, to wit, July 3, 1929; and, under direction of the Department of Justice of the United States of America, does hereby pray an appeal, and does hereby appeal from

the said final order and decree of, to wit, July 3, 1929, to the United States Circuit Court of Appeals for the Fifth Circuit.

And the said respondent files herewith an assignment of errors in the said cause, and bases his appeal on the reasons therein specified, and prays that the appeal may be allowed; and that a transcript of the record, papers, and proceedings in which said final decree was made, duly authenticated, may be sent to the said United States Circuit Court of Appeals for the Fifth Circuit.

282 LETUS N. CROWELL,
As Deputy Commissioner,
United States Employees' Compensation Commission
for the Seventh Compensation District.
ALEX C. BIRCH,
United States Attorney for
the Southern District of Alabama.
By J. E. MEREDITH,
Assistant United States Attorney.

[File endorsement omitted.]

283 In United States District Court

Assignment of errors by deputy commissioner

[Title omitted.]

Filed Sept. 25, 1929

To the honorable ROBERT T. ERVIN, *judge of the United States District Court for the Southern District of Alabama:*

Comes Letus N. Crowell, as deputy commissioner, United States Employees' Compensation Commission for the seventh compensation district, one of the respondents in the above styled cause, in his own proper person and by and through the United States attorney for the southern district of Alabama, and respectfully says and shows that he, as such deputy commissioner, is agrieved by the final decree entered herein on, to wit, July 3, 1929; and the said Letus N. Crowell, as such deputy commissioner, says and shows that in the record and proceedings of the court in this cause and in the said final decree there is manifest error; and, as grounds thereof, said respondent assigns the following, separately and severally:

1st. The court erred in overruling the respondent Crowell's motion filed, to wit, February 7, 1929, to dismiss the original bill of complaint.

284 2nd. The court erred in its opinion of, to wit, May 27, 1929, holding that the longshoremen's and harbor workers' compensation act (act of March 4, 1927, chapter 509, section 1, 44 Stat. 1424; U. S. C. A. title 33, sections 901 et seq.) is unconstitutional and void, as being in contravention of the Constitution of the United States, unless construed so as to provide a de novo hearing upon the facts in the United States district court sitting in admiralty.

3rd. The court erred in its opinion of, to wit, May 27, 1929, holding that the longshoremen's and harbor workers' compensation act (act of March 4, 1927, chapter 509, section 1, 44 stat. 1424; U. S. C. A. title 33, sections 901 et seq.) is unconstitutional and void as contravening article 3, section 2, of the Constitution of the United States, providing: "The judicial power shall extend * * * to all cases of admiralty and maritime jurisdiction;" unless said act be construed as providing a de novo hearing upon the facts in the United States district court, thereby overruling respondent Crowell's motion filed, to wit, February 7, 1929, to dismiss the original bill.

4th. The court erred in its opinion of, to wit, May 27, 1929, holding that the longshoremen's and harbor workers' compensation act (act of March 4, 1927, chapter 509, section 1, 44 Stat. 1424; U. S. C. A. title 33, sections 901 et seq.) is unconstitutional and void as contravening that the part of the fifth amendment to the Constitution of the United States providing that no person shall be "deprived of life, liberty, or property without due process of law;" unless said act be construed as providing a de novo hearing upon the facts in the United States district court, thereby overruling respondent Crowell's motion filed, to wit, February 7, 1929, to dismiss the original bill.

5th. The court erred in its holding of, to wit, May 27, 1929, that those portions of the longshoremen's and harbor workers' compensation act (act of March 4, 1927, chapter 509, section 1, 44 Stat. 1424; U. S. C. A. title 33, sections 901 et seq.) providing for procedure before and orders by the deputy commissioner are unconstitutional and void as being in contravention of article 3, section 2, of the United States Constitution providing: "The judicial power shall extend * * * all cases of admiralty and maritime jurisdiction."

6th. The court erred in its holding that those portions of the longshoremen's and harbor worker's compensation act (act of March 4, 1927, chapter 509, section 1, 44 Stat. 1424; U. S. C. A., title 33, sections 901 et seq.) providing for procedure before and orders by the deputy commissioner are unconstitutional and void as being in contravention of that portion of the fifth amendment of the United States Constitution, providing that no person shall be "deprived of life, liberty, or property without due process of law."

7th. The court erred in holding in its opinion of, to wit, May 27, 1929, that the longshoremen's and harbor workers' compensation act (act of March 4, 1927, chapter 509, section 1, 44 Stat. 1424; U. S. C. A., title 33, sections 901 et seq.) gives to the United States district court, in proceedings under said act, jurisdiction to hear and determine issues of fact, without regard to evidence introduced before the deputy commissioner.

8th. The court erred in failing to sustain respondent Crowell's motion, filed, to wit, February 7, 1929, to dismiss the original bill of complaint, based on the insistence that said bill fails to show that there was no competent evidence before respondent Crowell, as

deputy commissioner of the seventh compensation district, to support the award which said bill sought to enjoin.

9th. The court erred in failing to sustain respondent Crowell's motion filed, to wit, February 7, 1929, to dismiss the original bill of complaint, based on the insistence that said bill does not set forth, in whole or in part, the evidence or proof which was submitted to the deputy commissioner at the hearing on which an order praying to be enjoined was entered.

10th. The court erred in finally decreeing on, to wit, July 3, 1929, in favor of the complainant and against the respondent Crowell.

11th. The court erred in finding in its final decree, entered on, to wit, July 3, 1929, that the complainant was not in fact an employer of the respondent Knudsen at the time of the latter's injury; which finding was based upon a de novo hearing, and without considering or examining the proceedings had before the deputy commissioner.

12th. The court erred in entering on, to wit, July 3, 1929, the final decree, appealed from, upon a de novo hearing, and without regard to the proceedings before the deputy commissioner.

13th. The court erred in failing in its final decree, entered, to wit, July 3, 1929, to decree in favor of respondent Crowell under the record of and proceedings had before the respondent Crowell, as deputy commissioner of the seventh compensation district.

Wherefore, Letus N. Crowell, as deputy commissioner, United States Employees' Compensation Commission for the seventh compensation district, for these and other errors, prays that an appeal may be allowed, and hereby appeals from said decree to the United States Circuit Court of Appeals for the Fifth Circuit; and prays that a transcript of the record herein may be sent to said court for filing, and that said court will proceed to hear said cause and reverse said decree; and for such other and further relief as may be just.

LETUS N. CROWELL,
As Deputy Commissioner, United States Employees' Compensation Commission for the Seventh Compensation District.

ALEX C. BIRCH,
United States Attorney for the Southern District of Alabama.
By J. E. MEREDITH,
Assistant United States Attorney.

[File endorsement omitted.]

In United States District Court

[Title omitted.]

Motion of Knudsen to join in appeal, etc.

Filed Sept. 25, 1929

Now comes J. B. Knudsen, one of the respondents in the above styled cause, and hereby prays to be allowed to join in the appeal

taken in this cause by Letus N. Crowell, as deputy commissioner, United States Employees' Compensation Commission for the seventh compensation district, who is the other respondent in this cause, from the final decree made and entered in said cause on, to-wit, July 3, 1929, to the United States Circuit Court of Appeals for the Fifth Circuit; and said respondent Knudsen does hereby join in the appeal of the said Crowell, as such deputy commissioner, and does hereby pray an appeal; and does hereby appeal jointly with said Crowell, as such deputy commissioner, from the said final order and decree of, to-wit, July 3, 1929, to the United States Circuit Court of Appeals for the Fifth Circuit.

And the said respondent Knudsen files herewith his assignments of error in the said cause, and bases his appeal on the reasons therein specified, and prays that the appeal may be allowed; and that a transcript of the record, papers and proceedings in which said
289 final decree was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Fifth Circuit.

J. B. KNUDSEN,
By PILLANS, COWLEY & GRESHAM,
His Proctors of Record.

[File endorsement omitted.]

In United States District Court

[Title omitted.]

Assignment of errors by Knudsen

Filed Sept. 25, 1929

To the honorable ROBERT T. ERVIN, *Judge of the United States District Court for the Southern District of Alabama:*

J. B. Knudsen, one of the respondents in the above styled
290 cause, respectfully represents that he is aggrieved by the decree entered herein on, to-wit, July 3, 1929; and that in said decree and in the record and proceedings of the court in this cause there is manifest error, and, as grounds thereof, said respondent assigns the following, separately and severally:

1st. The court erred in overruling the respondent Knudsen's motion, filed, to-wit, February 14, 1929, to dismiss the original bill of complaint.

2nd. The court erred in its opinion of, to-wit, May 27, 1929, holding that the longshoremen's and harbor workers' compensation act (act of March 4, 1927, chapter 509, section 1, 44 Stat. 1424; U. S. C. A. title 33, sections 901 et seq.,) is unconstitutional and void, as being in contravention of the Constitution of the United States; unless construed so as to provide a de novo hearing upon the facts in the United States District Court sitting in admiralty.

3rd. The court erred in its opinion of, to-wit, May 27, 1929, holding that the longshoremen's and harbor workers' compensation act

(act of March 4, 1927, chapter 509, section 1, 44 Stat. 1424; U. S. C. A. title 33, sections 901 et seq.,) is unconstitutional and void, as contravening article 3, section 2, of the Constitution of the United States, providing: "The judicial power shall extend * * * to all cases of admiralty and maritime jurisdiction"; unless said act be construed as providing a de novo hearing, upon the facts in the United States District Court, thereby overruling respondent Knudsen's motion filed, to-wit, February 14, 1929, to dismiss the original bill.

4th. The court erred in its opinion of, to-wit, May 27, 1929, holding that the longshoremen's and harbor workers' compensation act (act of March 4, 1927, chapter 509, section 1, 44 Stat. 1424; U. S. C. A. title 33, sections 901 et seq.,) is unconstitutional and void, as
291 contravening that part of the fifth amendment to the Constitution of the United States, providing that no person shall be "deprived of life, liberty, or property without due process of law"; unless said act be construed as providing a de novo hearing upon the facts in the United States District Court, thereby overruling respondent Knudsen's motion filed, to-wit, February 14, 1929, to dismiss the original bill.

5th. The court erred in its holding of, to wit, May 27, 1929, that those portions of the longshoremen's and harbor workers' compensation act (act of March 4, 1927, chapter 509, section 1, 44 Stat. 1424; U. S. C. A., title 33, sections 901 et seq.) providing for procedure before and orders by the deputy commissioner are unconstitutional and void, as being in contravention of article 3, section 2, of the United States Constitution, providing: "The judicial power shall extend * * * to all cases of admiralty and maritime jurisdiction."

6th. The court erred in its holding of, to wit, May 27, 1929, that those portions of the longshoremen's and harbor workers' compensation act (act of March 4, 1927, chapter 509, section 1, 44 Stat. 1424; U. S. C. A., title 33, sections 901 et seq.) providing for procedure before and orders by the deputy commissioner are unconstitutional and void, as being in contravention of that portion of the fifth amendment to the United States Constitution, providing that no person shall be "deprived of life, liberty or property, without due process of law."

7th. The court erred in holding in its opinion of, to wit, May 27, 1929, that the longshoremen's and harbor workers' compensation act (act of March 4, 1927, chapter 509, section 1, 44 Stat. 1424; U. S. C. A., title 33, section 901 et seq.) gives to the United States district court in proceedings under said act jurisdiction to hear and determine issues of fact without regard to evidence introduced before the deputy commissioner.

292 8th. The court erred in failing to sustain respondent Knudsen's motion filed, to wit, February 14, 1929, to dismiss the original bill of complaint, based on the insistence that said bill fails to show that there was no competent evidence before the deputy

commissioner of the seventh compensation district to support the award which said bill sought to enjoin.

9th. The court erred in finally decreeing on, to wit, July 3, 1929, in favor of the complainant and against the respondent Knudsen.

10th. The court erred in finding in its final decree entered on, to wit, July 3, 1929, that the complainant was not in fact an employer of the respondent, Knudsen, at the time of the latter's injury, which finding was based upon a de novo hearing and without considering or examining the proceedings had before the deputy commissioner.

11th. The court erred in entering on, to wit, July 3, 1929, the final decree, appealed from, upon a de novo hearing and without regard to the proceedings before the deputy commissioner.

12th. The court erred in failing in its final decree entered, to wit, July 3, 1929, to decree in favor of respondent, Knudsen, under the record of and the proceedings had before the deputy commissioner.

Wherefore, J. B. Knudsen prays that he may be allowed to join in the appeal of Letus N. Crowell, as deputy commissioner, United States Employees' Compensation Commission for the seventh compensation district, and the said Knudsen does hereby join in the appeal of the said Crowell, and does hereby appeal jointly with the said Crowell, as such deputy commissioner, from said decree to the United States Circuit Court of Appeals for the Fifth Circuit,
293 and prays that a transcript of the record herein may be sent to said court for filing; and that said court will proceed to hear said cause and reverse said decree; and for such other and further relief as may be just.

J. B. KNUDSEN,
By PILLANS, COWLEY & GRESHAM,
His Proctors of Record.

[File endorsement omitted.]

In United States district court

[Title omitted.]

Order allowing appeal

Filed September 25, 1929

This cause coming on to be heard on the motion of Letus N. Crowell, as deputy commissioner, United States Employees' Compensation Commission for the seventh compensation district, by and through the United States attorney for the southern district of Alabama; for an order allowing an appeal; and on the motion of
294 J. B. Knudsen that he be allowed to join in the appeal of the said Crowell as such respondent; and that he be allowed jointly with said respondent an appeal to the United States Circuit Court of Appeals for the Fifth Circuit; and it appearing to the court that both said Crowell, as such deputy commissioner, and the said Knud-

sen, have filed in this cause their assignments of error; and that said Crowell, as such commissioner, has prayed an appeal; and that the said Knudsen has joined in the said appeal to the United States Circuit Court of Appeals for the Fifth Circuit, from the final decree of this court rendered herein on, to wit, July 3, 1929; and it further appearing to the court that the appeal of the said Crowell, as such deputy commissioner, has been taken by direction of the Department of Justice of the United States of America:

Now, therefore, it is ordered and decreed by the court that the appeal of the said Crowell, as such deputy commissioner, be and the same hereby is allowed; that the said J. B. Knudsen be and he hereby is allowed to join in the appeal of the said Crowell, as such deputy commissioner; and that both the said respondents' appeal, as a joint appeal from the final decree of this court of, to wit, July 3, 1929, to the United States Circuit Court of Appeals for the Fifth Circuit, be and the same hereby is ordered and allowed, as prayed in the petitions of said respondents.

This September 25th, 1929.

ROBERT T. ERVIN, *Judge.*

[File endorsement omitted.]

295 [Clerk's certificate to foregoing transcript omitted in printing.]

296 [Minute entry of argument and submission, October 20, 1930, omitted in printing.]

297 In United States Circuit Court of Appeals for the Fifth Circuit

No. 5802

LETUS N. CROWELL, AS DEPUTY COMMISSIONER FOR THE SEVENTH COMPENSATION DISTRICT OF THE UNITED STATES EMPLOYEES' COMPENSATION COMMISSION; AND J. B. KNUDSEN, APPELLANTS

VERSUS

CHARLES BENSON, APPELLEE

Appeal from the District Court of the United States for the Southern District of Alabama

Alexander C. Birch, U. S. Atty., Palmer Pillans and Alexis T. Gresham (Alex. C. Birch, U. S. Atty., and Pillans, Cowley & Gresham on the brief), for appellants.

Wm. G. Caffey and Vincent F. Kilborn (Outlaw, Kilborn & Seale, and Harry T. Smith & Caffey on the brief), for appellee.

Before FOSTER and WALKER, Circuit Judges, and HOLMES, District Judge

Opinion filed November 17, 1930

WALKER, Circuit Judge: On July 4, 1927, J. B. Knudsen, one of the appellants (herein referred to as the claimant), sustained personal injuries while on a derrick barge which was owned by Charles Benson, the appellee, and was then moored in the Mobile River, a navigable stream, the claimant then being on the barge for the
298 purpose of splicing a wire cable which was part of its equipment. The claimant filed against the appellee a claim for compensation for those injuries under the longshoremen's and harbor workers' compensation act. (44 Stat. 1424; 33 U. S. C. A. §§901, et seq.) In that proceeding the appellee put in issue allegations of the claimant, including the allegation that at the time the alleged injuries were sustained the claimant was an employee of appellee. After a hearing on that claim before a deputy commissioner under the act mentioned, one of the appellants, at which evidence was presented by the claimant and appellee, that official made an order awarding compensation to the claimant. That order, in the caption of which Knudsen was styled "Claimant" and appellee was styled "Employer," contained what was called "Findings of Fact," which included the statement: "That on the 4th day of July, 1927, the claimant above named was in the employ of the employer above named in Mobile, Alabama." Other than that statement it contained nothing as to the facts of any relationship existing between the claimant and the appellee at the time the former was injured. Thereafter appellee filed in the court below what was called a "bill of complaint" against the appellants. That pleading, after alleging the proceedings under the claim filed by the claimant and the making of the above-mentioned order, alleged "that the said award and compensation order was not in accordance with law, for the reason that said J. B. Knudsen was not at the time of said injury an employee of the complainant, nor was the matter of his claim against this complainant within the jurisdiction of the said deputy commissioner." That pleading contained further allegations to the effect
299 that prior to the date of the alleged injury, and after the derrick barge had been loaned by the appellee to the claimant and/or one Beauregard Roberts, and while it was used by one or both of them for purposes in which appellee was not concerned, the claimant wrongfully cut a cable thereon, and that at the time of the alleged injury the claimant was on board the barge for the purpose of splicing that cable as an act of reparation for the damage done by cutting it, but was not there as an employee or at the instance of appellee. That pleading prayed that the enforcement of that award be enjoined, and that it be set aside. After the overruling of motions of the appellants that appellee's bill be dismissed—

which motions stated the following, among other grounds: "The facts alleged do not show that there was no competent evidence before the deputy commissioner to support his order sought to be enjoined"—and after the appellant had filed an answer to the bill, the court entered upon a trial de novo of the issues raised, heard evidence offered by the opposing parties, consisting of testimony of witnesses examined in the presence of the court, and rendered a final decree, which contained a finding to the effect that the claimant was not in the employ of the appellee at the time the former sustained the injuries mentioned, and adjudged that the above-mentioned award was not in accordance with law, and that that award be in all things set aside. That decree contained the recital that "the respondent Crowell produced, offered, and filed in evidence the record of the proceedings before him as deputy commissioner, but did not read same to the court, nor did the court read it."

It is not questioned, and is not fairly open to question, that testimony given in the presence of the court supported a finding that at the time claimant sustained the alleged injuries he was not an
300 employee of the appellee. It appears from the opinion rendered by the district judge that his action in having a trial de novo for the purpose of passing on the question whether the award made by the deputy commissioner was or was not "in accordance with law," with the result of not confining the evidence to be considered to that taken before the deputy commissioner, was influenced by his conclusions that the provision of the above-mentioned act with reference to a compensation order being passed on by a district court was constitutionally invalid unless under that provision a court in passing on such an order properly may consider evidence other than or in addition to that heard by the official who made the order in question; and that under that provision it was permissible for the court, in passing on the challenged award of compensation, to hear and consider evidence other than or in addition to that taken before the official who made that award. (Benson v. Crowell, 33 Fed. (2d) 137.) Three Circuit Courts of Appeals (of the Third, Fourth, and Ninth Circuits) have reached conclusions opposed to those expressed by the district judge, deciding that the district court, in determining whether the award in question was or was not "in accordance with law," can consider no evidence other than that which was taken before the official who made the award of compensation, and that a challenged award must be confirmed if there was any evidence before the deputy commissioner supporting it. (Nordhavet (Parks Case), 1930 Am. Mar. Cas. 1827; Wheeling Corrugating Co. v. McManigal, 41 Fed. (2) 593; Northwestern Stevedoring Co. v. Marshall, Ib. 28.) Several district courts have reached conclusions in harmony with those arrived at in the three just cited cases. (Obrecht-Lynch Corporation v. Clark, 30 Fed. (2) 144; Merchants & Miners Transportation Co. v. Norton, 32 Fed. (2) 513; Joyce v. United States Deputy Commissioner, 33 Fed. (2d)

301 218; Pocahontas Fuel Co. v. Monahan, 34 Fed. (2) 549; Gray Harbor Stevedore Co. v. Marshall, 36 Fed. (2) 314.)

By the assertion and prosecution of the claim in question one individual sought to deprive another individual of property, the sum of money required to pay the compensation claimed and awarded. The fifth amendment to the Constitution of the United States has the effect of forbidding the accomplishment of that result under the claim asserted without due process of law. For the appellee to have the benefit of the due process of law to which he is entitled he must have had, at some stage of the proceeding prescribed by the above-mentioned act for the assertion and allowance of a claim to compensation under it, a fair opportunity for submitting to a judicial tribunal, for determination upon its own independent judgment as to both law and facts, the question whether the claim asserted is or is not allowable and enforceable. (Ohio Valley Co. v. Ben Avon Borough, 253 U. S. 287; Bluefield Co. v. Pub. Ser. Comm., 262 U. S. 679, 689; Lehigh Valley R. R. v. Commissioners, 278 U. S. 24, 37–41; Liu Hop Fong v. United States, 209 U. S. 453, 461; Ng Fung Ho. v. White, 259 U. S. 276, 284.) When a contested money demand is that of one private individual against another private individual, the latter is entitled to have the question of his liability passed on by a judicial tribunal before the issue of process, in its nature final, for the enforcement of the asserted liability. (Murray's Lessee v. Hoboken Land & Improvement Co., 18 How. 272, 284.) It is hardly consistent with the just stated proposition to hold that, as to the facts required to support its action in a case presented to it for decision, a court is restricted to a determination of the question whether an administrative official, who, as required by law, first passed on the controversy involved in the case, (did or did not have before him substantial evidence to prove the facts required to support
302 his conclusion. The claimant's injury having been sustained while he was on a vessel afloat in navigable waters, where he then was for the purpose of rendering a maritime service, the claim for compensation was within the admiralty jurisdiction, which jurisdiction is vested exclusively in constitutional Federal courts, not in legislative courts or tribunals, or in any executive official. (Martin v. Hurler's Lessee, 1 Wheat, 304; Southern Pacific Co. v. Jensen, 244 U. S. 205; Northern Coal & Dock Co. v. Strand, 278 U. S. 142; Panama v. Vasquez, 271 U. S. 557; Ex parte Bakelite Corp'n, 279 U. S. 438, 451.)

The above mentioned act provides for a claim for compensation being filed with a deputy commissioner, who is required, by order, to reject the claim or make an award in respect thereof; and that act provides: "If not in accordance with law, a compensation order may be suspended or set aside, in whole or in part, through injunction proceedings, mandatory or otherwise, brought by any party in interest against the deputy commissioner making the order, and instituted in the Federal district court for the judicial district in which

the injury occurred (or in the Supreme Court of the District of Columbia if the injury occurred in the District)." (33 U. S. C. A. §§ 919, 921; 44 Stat. 1436, §§ 19, 21.)

As to the action of a deputy commissioner on a claim presented to him, the act provides for his making or causing to be made such investigation as he considers necessary in respect to the claim, for his ordering a hearing on the claim upon the application of any interested party, and that "in making an investigation or inquiry or conducting a hearing the deputy commissioner shall not be bound by common law or statutory rules of evidence, except as provided by this chapter; but may make such investigation or inquiry or conduct such hearing in such manner as to best ascertain the
303 rights of the parties." (33 U. S. C. A., § 919(e), 923.) The act contains no provision requiring the deputy commissioner to make a finding of facts. It provides no means of disclosing, as to facts required to sustain that official's conclusion evidenced by his order, whether in finding the existence of such facts he was or was not influenced solely by what he learned from an investigation or inquiry other than on the hearing ordered by him, or whether he did or did not attach any probative value to evidence adduced at such hearing. The provision of the act as to a party in interest getting before a court the question whether a compensation order is or is not in accordance with law contains nothing indicating what is to be considered by the court in passing on that question. There is nothing in that provision to indicate that anything done or said by or before the deputy commissioner, other than his order which is sought to be suspended or set aside, is required to be disclosed or made known to the court in any way. The act contains no intimation that the court, in passing on the question so brought before it for decision, is not permitted to consider any evidence except that which the deputy commissioner had before him. We have discovered no provision of the act which indicates a purpose to make conclusive, if supported by substantial evidence, a finding of fact made by a deputy commissioner. In the absence of such a provision the existence of such an intention is not to be presumed, especially where the fact in question is one upon the existence of which that official's right or power to act at all is dependent. The absence of any provision in the act that the hearing by the court shall be upon a transcript of the proceedings before the deputy commissioner indicates that the Congress intended to give to the applicant for injunctive relief the right to have a hearing de novo before the court. (Lai Hop Fong v. United States, supra.) The remedy provided
304 for, an injunction, usually is a process issuing from a court of first instance, whose action in awarding such process is based on evidence adduced before itself, and its own findings or conclusions from that evidence. In view of the above mentioned provisions of the act, and of its omissions, we think it well may be inferred that the provision of the act prescribing the proceeding

challenging a compensation award was not intended to be appellate in its nature, and that, as to the facts of the case brought before a court by the institution of such a proceeding, that provision was not intended to have the effect of restricting the court to the determination of the question whether there was any substantial evidence before the deputy commissioner to sustain a finding of the facts required to support his order.

Under the above-mentioned act, compensation was not allowable to the claimant against the appellee unless at the time the former was injured he was an employee of the latter. The denial that the relation of employer and employee existed between them at that time was a denial of an essential jurisdictional fact. If that relation did not exist at the time the claimant was injured, the challenged award was not "in accordance with law." In the argument reference was made to the decisions in the cases of New York Central Railroad Company v. White, 243 U. S. 188; and Hawkins v. Bleakly, Ib. 210, in support of the contention that, as to the question of the existence of that relationship at the time of the injury, it was consistent with the requirement of due process of law to make the finding of the deputy commissioner conclusive if there was before him any substantial evidence to support that finding. We do not think that the decision in either of those cases supports the contention mentioned.

The first cited of those cases brought into question some pro-
303 visions of the workmen's compensation law of New York. The procedural provisions of that law were not brought into question, as it appears from the following statement in the court's opinion: "No question is made but that the procedural provisions of the act are amply adequate to afford the notice and opportunity to be heard required by the fourteenth amendment." The other case involved provisions of a workmen's compensation law of the State of Iowa. The court's opinion (p. 215) contained a quotation from an opinion rendered by the Supreme Court of Iowa which plainly indicated that that court did not give to the statute in question the effect of interfering with the power of the courts to pass on such questions as whether a claimant under the statute was an employee or whether his injury was one arising out of his employment, and that that statute provided for a judicial review upon all fundamental and jurisdictional questions. It is not to be doubted that the question whether at the time of the alleged injury the relation of employer and employee did or did not exist between appellee and the claimant is a fundamental and jurisdictional one. Unless that relationship existed at that time the act conferred no power or jurisdiction on any one to consider and pass on a claim for compensation for the injury sustained by the claimant.

If the court was restricted to a consideration of only the evidence which the deputy commissioner had before him, an anomalous situation was presented in the instant case. As above indicated, the only conclusion stated by the deputy commissioner on the subject of the

pensation Commission, petitioner, vs. Charles Benson. Filed February 12, 1931. File No. 35652.

File No. 35653. U. S. Circuit Court of Appeals, Fifth Circuit Term No. 731. Letus N. Crowell, as deputy commissioner for the seventh compensation district of the United States Employees' Compensation Commission, and J. B. Knudsen, petitioners, vs. Charles Benson. Filed February 12, 1931. File No. 35653.

Petition for writs of certiorari and exhibit thereto.

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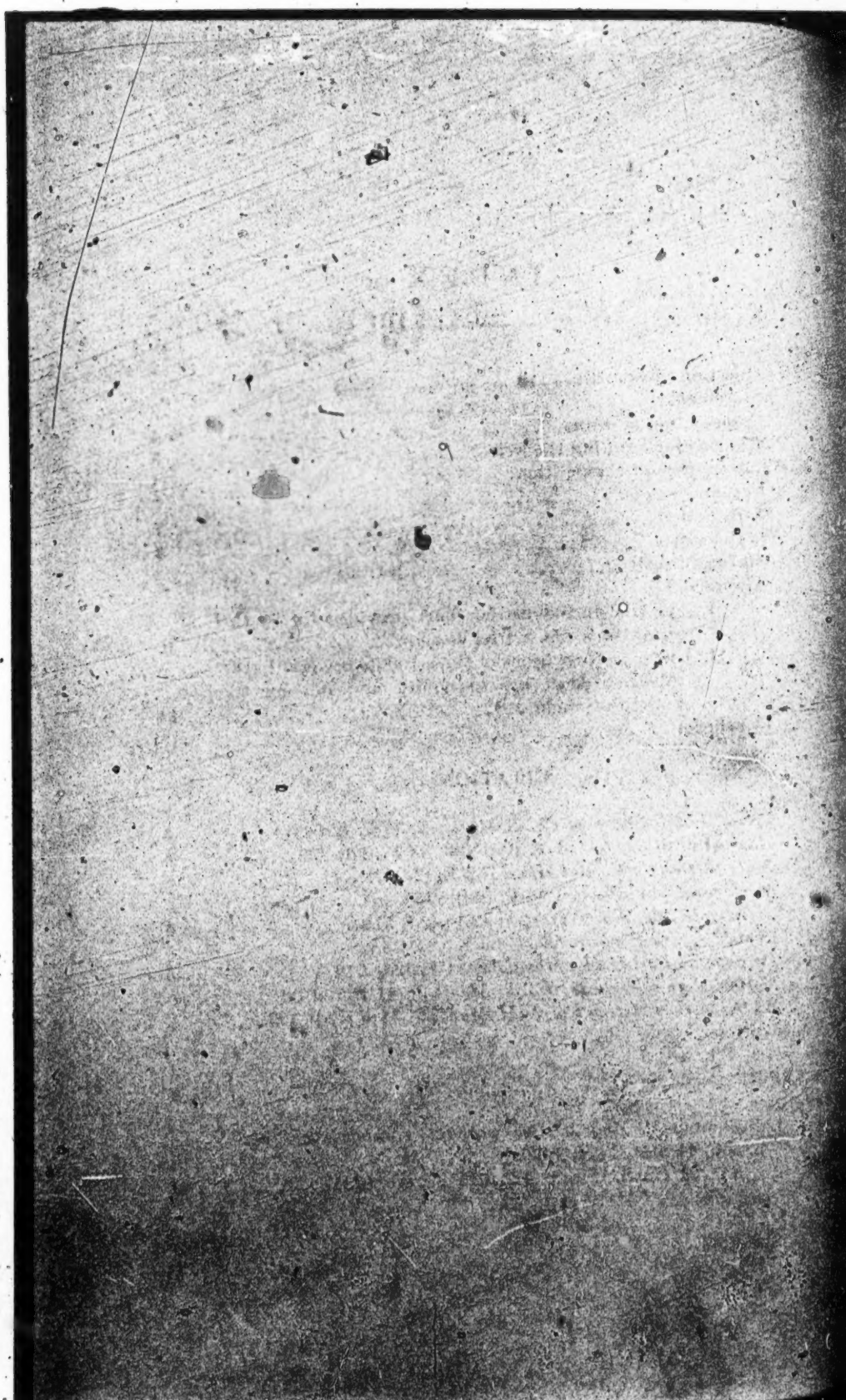

In the Supreme Court of the United States

OCTOBER TERM, 1939

No. ——

LETUS N. CROWELL, AS DEPUTY COMMISSIONER FOR the Seventh Compensation District of the United States Employees' Compensation Commission, petitioner

v.

CHARLES LONDON

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF

The Solicitor General, on behalf of Letus N. Crowell, Deputy Commissioner for the Seventh Compensation District of the United States Employees' Compensation Commission, prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Fifth Circuit entered in the above case on November 17, 1939 (R. 302), affirming the decision of the United States District Court for the Southern District of Alabama.

relationship between the claimant and appellee was the one fo
in the above set out quotation from the deputy commissioner's or
That was a statement of his legal conclusion that the relationsh
mentioned existed. What facts he considered to have the re
of creating that relationship are not disclosed. Though in the
306 hearing before him there was testimony to prove facts fr
which the existence of that relationship arose, it was not m
to appear that the deputy commissioner in reaching his legal co
clusion had in mind such facts, or that he was influenced by th
evidence or accorded to it any probative value. There was noth
before the court to negative the inference that the stated legal co
clusion of the deputy commissioner was based entirely on what h
or some other person saw or heard in an investigation or inqui
other than in the hearing in which was adduced evidence which
brought before the court. What was seen or heard in such oth
investigation or inquiry was not made known to the court in any wa
The record does not show that the deputy commissioner found an
fact or state of facts having any bearing on the question of th
existence vel non of the relation of employer and employee betwee
the appellee and the claimant. It does not show that evidence pr
duced in the hearing before the deputy commissioner supported a
conclusion of fact reached by him with reference to any relation b
tween the claimant and the appellee. This being so, it does not see
that it properly can be affirmed that evidence disclosed to the co
supported any conclusion of fact on that subject actually reache
by the deputy commissioner. It can not well be inferred or suppos
that it was intended to require a court to give conclusive effect to
finding of fact made by an executive official when it is not mad
known to the court what that finding was, or that evidence whic
was before that official supported that finding.

We conclude that the court did not err in its above-mentioned ru
ings. The decree is affirmed.

307 In United States Circuit Court of Appeals

No. 5802

LETUS N. CROWELL, AS DEPUTY COMMISSIONER FOR THE SEVENTH COMPENSATION DISTRICT OF THE UNITED STATES EMPLOYEES' COMPENSATION COMMISSION; AND J. B. KNUDSEN

VERSUS

CHARLES BENSON

Judgment Nov. 17, 1930

This cause came on to be heard on the transcript of the re
from the District Court of the United States for the Southern D
trict of Alabama, and was argued by counsel.

On consideration whereof, it is now here ordered, adjudged, and decreed by this court that the decree of the said district court in this cause be, and the same is hereby, affirmed.

[Clerk's certificate to foregoing transcript omitted in printing.]

Supreme Court of the United States

No. 730, October term, 1930

LEWIS N. CROWELL, AS DEPUTY COMMISSIONER FOR THE SEVENTH COMPENSATION DISTRICT OF THE UNITED STATES EMPLOYEES' COMPENSATION COMMISSION, PETITIONER

vs.

CHARLES BENSON

Order allowing certiorari

Filed March 16, 1931

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Supreme Court of the United States

No. 731, October Term, 1930

LEWIS N. CROWELL, AS DEPUTY COMMISSIONER FOR THE SEVENTH COMPENSATION DISTRICT OF THE UNITED STATES EMPLOYEES' COMPENSATION COMMISSION AND J. B. KNUDSEN, PETITIONERS

vs.

CHARLES BENSON

Order allowing certiorari

Filed March 16, 1931

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[Endorsement on cover:]

[illegible] No. 35682. U. S. Circuit Court of Appeals, Fifth Circuit. [illegible] No. 730. Lewis N. Crowell, as deputy commissioner for the [illegible] compensation district of the United States Employees' Com-

QUESTION PRESENTED

Whether, in a suit brought in a United States District Court under Section 21 of the Longshoremen's and Harbor Workers' Compensation Act to set aside an award made by a Deputy Commissioner, there is a right of trial *de novo* of the issues of fact determined by the Deputy Commissioner.

STATEMENT

This suit was brought in the United States District Court for the Southern District of Alabama by Charles Benson, the owner of a barge, under Section 21 (b) of the Longshoremen's and Harbor Workers' Compensation Act, to set aside an award made by the Deputy Commissioner of the United States Employees' Compensation Commission in favor of J. B. Knudsen, who was injured on the barge.

The claimant, while working on a barge which was moored in the navigable waters of the Mobile River and belonging to Charles Benson, was seriously injured by certain tackle giving away. (R. 3.) Knudsen filed a claim for compensation before the Deputy Commissioner under authority of the Longshoremen's and Harbor Workers' Compensation Act. (R. 8.) The owner of the barge filed an answer denying the relationship of employer and employee at the time of the injury and denying liability for the payment of compensation. (R. 153, 154.) At this hearing Knudsen testified

that he was employed by Benson and while under such employment the injuries were sustained (R. 197–199, 202, 210), and other testimony on his behalf was to the same effect (R. 163–184). The evidence of Benson, owner of the barge, and other witnesses on his behalf, was to the effect that the claimant, Knudsen, was not in the employ of Benson at the time the injuries were sustained. After a full hearing on the merits before the Deputy Commissioner, at which both sides were represented, and witnesses were produced and examined by each side (R. 161–278), the Deputy Commissioner made findings of fact sustaining the contention of Knudsen that he was in the employ of Benson, owner of the barge, at the time of the accident (R. 133), and made an award in favor of the injured employee (R. 135). Benson filed a bill in equity in the United States District Court under Section 21 (b) of the Act seeking to have the award set aside on the ground that it was not in accordance with law, in that Knudsen was not in his employ at the time of the injury. (R. 2–7.) The District Judge transferred the suit to the admiralty side of the court (R. 46), and after holding a trial *de novo* (R. 50–132), entered a decree setting aside the award of the Deputy Commissioner and permanently enjoined the enforcement of same (R. 278–280). There was filed in evidence the record made before the Deputy Commissioner, but this was not considered by the District Judge, who upon the evidence taken *de*

novo found, contrary to the finding of the Deputy Commissioner, that Knudsen was not in the employ of Benson. (R. 279.)

The District Court held that unless there was the right of a trial *de novo* the "act was beyond the power of Congress and is void" (R. 40), and that in order to hold the Act constitutional and not in violation of Article III, Section 2 of the Constitution, and of the Fifth Amendment, it must follow that the District Court may disregard entirely the proceedings before the Deputy Commissioner and hear the case as upon an original proceeding or as a trial *de novo* (R. 35, 44).

The Circuit Court of Appeals held that the testimony given before the District Court established that the injured claimant was not in the employ of the barge owner at the time the injuries were sustained; that there was a right of trial *de novo* in the District Court on the admiralty side, and affirmed the rulings of the District Court (R. 296-302).

SPECIFICATION OF ERRORS

The Circuit Court of Appeals erred—

I. In holding there was the right of a trial *de novo* in the District Court and that the Act was unconstitutional unless there was that right.

II. In holding that the injunction proceedings authorized by the Act should be heard in admiralty rather than in equity.

REASONS FOR GRANTING THE WRIT

1. The decision of the court below is in direct conflict with the decisions of three other Circuit Courts of Appeals. The Circuit Court of Appeals for the Fourth Circuit in *Wheeling Corrugating Co.* v. *McManigal, Deputy Commissioner,* 41 F. (2d) 593, held that there is no right of trial *de novo* in the District Court, after considering the opinion of the District Court in the instant case. The Circuit Court of Appeals for the Ninth Circuit in *Northwestern Stevedoring Company* v. *Marshall, Deputy Commissioner,* 41 F. (2d) 28, and the Circuit Court of Appeals for the Third Circuit in *McCahan Co.* v. *Norton, Deputy Commissioner,* 43 F. (2d) 505, reached the same conclusion and held the Act constitutional.

Until the decision of the District Court in this case, the District Courts had uniformly held that there was no right of trial *de novo* in the District Court, that the District Court was confined in its consideration of the case to the record made before the Deputy Commissioner and to a determination of the validity of the administrative award. Some of those cases are: *Obrecht-Lynch Corp.* v. *Clark,* 30 F. (2d) 144 (D. Md.); *Merchants' & Miners' Transp. Co.* v. *Norton,* 32 F. (2d) 513 (E. D. Pa.); *Joyce* v. *Deputy Commissioner,* 33 F. (2d) 218 (D. Me.); *Pocahontas Fuel Co.* v. *Monahan,* 34 F. (2d) 549 (D. Me.); *Grays Harbor Stevedore Co.* v. *Marshall,* 36 F. (2d) 814 (W. D. Wash.); *Howard*

v. *Monahan*, 31 F. (2d) 480, 33 F. (2d) 220 (S. D. Tex.).

2. The Circuit Court of Appeals held that the suit to set aside an award of a Deputy Commissioner must be on the admiralty side of the court instead of in equity. That ruling is likewise contrary to the above decisions in the other Circuit Courts of Appeals and the uniform rulings in the District Courts. In conferring jurisdiction on the United States District Courts in Section 21 (b) of the Act, Congress provided that the compensation order could be suspended or set aside through injunction proceedings, mandatory or otherwise. As the purpose of the Act was to provide a speedy review by the courts of an administrative award, the proceedings should be on the equity side. A trial of the issues *de novo* would involve the determination of questions cognizable in admiralty, but the review of an administrative order does not.

Wherefore, it is respectfully submitted that this petition should be granted.

THOMAS D. THACHER,
Solicitor General.

FEBRUARY, 1931.

BRIEF IN SUPPORT OF THE PETITION

OPINIONS BELOW

The opinion of the District Court (R. 33) is reported in 33 F. (2d) 137. The opinion of the Circuit Court of Appeals (R. 296) has not been reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on November 17, 1930. (R. 302.) The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

STATEMENT

A statement of the facts, the questions involved, and the errors assigned will be found in the petition.

STATUTES INVOLVED

Section 21 of the Longshoremen's and Harbor Workers' Compensation Act (Act of March 4, 1927), c. 509, 44 Stat. 1424, 1436 (U. S. C. Sup. III, Title 33, Sec. 921), provides:

> (a) A compensation order shall become effective when filed in the office of the deputy commissioner as provided in section 19, and, unless proceedings for the suspension or setting aside of such order are instituted as provided in subdivision (b) of this section, shall become final at the expiration of the thirtieth day thereafter.

(b) If not in accordance with law, a compensation order may be suspended or set aside, in whole or in part, through injunction proceedings, mandatory or otherwise, brought by any party in interest against the deputy commissioner making the order, and instituted in the Federal district court for the judicial district in which the injury occurred (or in the Supreme Court of the District of Columbia if the injury occurred in the District). The orders, writs, and processes of the court in such proceedings may run, be served, and be returnable anywhere in the United States. The payment of the amounts required by an award shall not be stayed pending final decision in any such proceeding unless upon application for an interlocutory injunction the court, on hearing, after not less than three days' notice to the parties in interest and the deputy commissioner, allows the stay of such payments, in whole or in part, where irreparable damage would otherwise ensue to the employer. The order of the court allowing any such stay shall contain a specific finding, based upon evidence submitted to the court and identified by reference thereto, that such irreparable damage would result to the employer, and specifying the nature of the damage.

(c) If any employer or his officers or agents fails to comply with a compensation order making an award, that has become final, any beneficiary of such award or the deputy commissioner making the order, may

apply for the enforcement of the order to the Federal district court for the judicial district in which the injury occurred (or to the Supreme Court of the District of Columbia if the injury occurred in the District). If the court determines that the order was made and served in accordance with law, and that such employer or his officers or agents have failed to comply therewith, the court shall enforce obedience to the order by writ of injunction or by other proper process, mandatory or otherwise, to enjoin upon such person and his officers and agents compliance with the order.

(d) Proceedings for suspending, setting aside, or enforcing a compensation order, whether rejecting a claim or making an award, shall not be instituted otherwise than as provided in this section and section 18.

Sections 14 and 18–28 of the Act provide in detail the powers and duties of the Deputy Commissioner in connection with making an award. Section 22 provides for modification of an award by the Deputy Commissioner on his own initiative or on application of an interested party under the procedure of Section 19. Section 23 provides that the Deputy Commissioner on a hearing is not bound by common law or statutory rules of evidence or by technical or formal rules of procedure except as specifically provided in the Act. Sections 24 and 25 provide for the attendance of witnesses, the taking of testimony by deposition, and the payment of

witnesses. Section 27 provides that the Deputy Commissioner shall have power to preserve and enforce order during any such proceedings; to issue subpoenas for, to administer oaths to, and to compel the attendance and testimony of witnesses or the production of documents, records, and other evidence; to examine witnesses and to do all things conformable to law which may be necessary to enable him to discharge the duties of his office and arrive at a proper conclusion as to whether an award is payable for the alleged injury. Under the Act the Deputy Commissioner is given broad and designated powers for determining the merits of a claim filed before him by an injured employee.

ARGUMENT

I

THE TRIAL IN THE DISTRICT COURT PROVIDED FOR BY THE STATUTE IS NOT A TRIAL DE NOVO

In holding that there was the right of a trial *de novo* to determine whether the award of the Deputy Commissioner was made "in accordance with law," the Circuit Court of Appeals adopted the ruling of the District Court that the Act was unconstitutional unless such right existed, and in support of that conclusion held that a suit brought in the District Court must be on the admiralty side rather than in equity. The Circuit Courts of Appeals for the Third, Fourth, and Ninth Circuits had

previously reached a conclusion to the contrary, and the uniform rulings of the District Courts had been in accord with these decisions. (See pp. 4, 5, *supra.*)

The purpose of the Longshoremen's and Harbor Workers' Compensation Act is to extend to workers upon the navigable waters of the United States, who can not be protected by State legislation, the benefits of a compulsory compensation system for disability or death resulting from injury received in the course of their employment. One of the chief benefits of the Act is that it eliminates the delay and expense incident to litigation. This benefit would be largely, if not entirely lost, if upon application for injunction the courts should be under the necessity of hearing *de novo* the claim for compensation or of weighing the evidence and passing upon the facts. If such were the law, the courts would be appealed to in practically every contested case, counsel would be as necessary as formerly, and the provisions for hearing before the Deputy Commissioner, instead of eliminating the delay of litigation would increase it. This, we submit, was not the intention of Congress. An additional reason for the view that Congress did not intend a hearing *de novo* in the District Court with a review of the facts by the court is found in Section 22 of the Act, which provides that the Deputy Commissioner upon his own initiative or

upon application of any party in interest may review the original order and upon the ground of changed conditions issue a new order terminating, continuing, increasing, or decreasing the compensation order.

If an employee or the employer has the right of a trial *de novo* in the District Court it follows that the provisions of the Act for hearings before the Deputy Commissioner and defining his powers in that connection are meaningless and would become nullified because the unsuccessful party before the Deputy Commissioner would in practically all cases take the case into court under Section 21 (b) of the Act and insist on a trial *de novo;* or to go one step further, either party could ignore the process issued by the Deputy Commissioner, decline to appear before him, and in the event of an adverse award go into the District Court and demand a trial *de novo* with the result that the proceeding before the Deputy Commissioner as provided for in the Act would be wholly ineffective. In establishing the procedure which it did in the Longshoremen's Act and conferring certain powers and duties on the Deputy Commissioner in connection with hearings and making awards, Congress doubtless had in mind a speedy determination of the rights of an injured longshoreman without the usual delays incident to litigation on the facts in the courts. Section 19 of the Act provides that within ten days after a claim is filed before him the Deputy Com-

missioner shall notify the interested parties that such claim has been filed, and if a hearing on the claim is ordered by the Deputy Commissioner notice shall be given the interested parties at least ten days in advance of such hearing and the Deputy Commissioner must, within 20 days after such hearing, reject a claim or make an award. Section 21 provides that a compensation order shall become final within thirty days unless there is filed within that period injunction proceedings in the United States District Court as provided in Section 21 (b). All the provisions of the Act dealing with the manner in which a remedy is given to an injured employee and the limited time within which action must be taken indicate a clear intention on the part of Congress that the facts should be determined by the Deputy Commissioner with a view to properly determining the rights of an injured employee, thereby avoiding the usual delays incident to litigation in the courts. The interests of the adverse party before the Deputy Commissioner are properly protected under Section 21 (b), which provides that the order of the Deputy Commissioner may be set aside if not made in accordance with law, and the action to be taken by the courts is confined within those limits. If there is some competent evidence before the Deputy Commissioner to sustain his award the District Court should affirm the award without holding a trial *de novo*.

II

UNDER THE PROVISIONS OF THE ACT SUITS BROUGHT IN THE DISTRICT COURT ARE IN EQUITY AND NOT ON THE ADMIRALTY SIDE

The Circuit Court of Appeals held that the suit in the District Court should be in admiralty, and used this conclusion in support of its holding that there was a right of trial *de novo* in the District Court. Section 5 provides that liability of an employer under Section 4 of the Act shall be exclusive and in place of all other liability of such employer to the employee or anyone entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation and the injuries result in death to the employee, election may be made to claim compensation under the Act or to maintain an action at law or in admiralty for damages on account of such injury or death. Section 21 provides for the institution of injunction proceedings, mandatory or otherwise, and that a temporary injunction may be entered pending the determination of the merits of the claim and a conclusion as to whether the award of the Deputy Commissioner should be suspended or set aside in whole or in part. The Circuit Courts of Appeals for the Third, Fourth, and Ninth Circuits and the District Courts, *supra*, have uniformly held that these suits should be heard on the equity side of the court.

CONCLUSION

It is respectfully submitted that because of the conflict of decisions on the questions presented in this case the petition for a writ of certiorari should be granted.

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No. 19

In the Supreme Court of the United States

OCTOBER TERM, 1931

LEITUS N. CROCKER, AS DEPUTY COMMISSIONER FOR THE SEVENTH COMPENSATION DISTRICT OF THE UNITED STATES EMPLOYEES' COMPENSATION COMMISSION, PETITIONER

v.

CHARLES BERSON

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE PETITIONER

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In the Supreme Court of the United States

OCTOBER TERM, 1931

No. 19

LETUS N. CROWELL, AS DEPUTY COMMISSIONER FOR the Seventh Compensation District of the United States Employees' Compensation Commission, petitioner

v.

CHARLES BENSON

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the District Court (R. 18–25) is reported in 33 F. (2d) 137. A supplemental opinion of the District Court which does not appear in the Record is reported in 38 F. (2d) 306. The opinion of the Circuit Court of Appeals (R. 185–190) is reported in 45 F. (2d) 66.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on November 17, 1930. (R. 190–191.) The petition for a writ of certiorari was filed February 12, 1931, and certiorari was granted March 16, 1931. (R. 191.) The jurisdiction of this Court rests on Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether, in a suit brought in a United States District Court under Section 21 of the Longshoremen's and Harbor Workers' Compensation Act to set aside an award made by a deputy commissioner, there is a right of trial *de novo* of the issues of fact determined by the deputy commissioner.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the Constitution provides in part as follows:

> No person shall * * * be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

In order to show its comprehensive nature and for the convenience of the Court, the Longshoremen's and Harbor Workers' Compensation Act (Act of March 4, 1927), c. 509, 44 Stat. 1424 (U. S. C. Sup. IV, Title 33, Secs. 901–950), is included in full in the pocket at the end of this brief.

Section 21 of this Act, which is the section particularly involved in the present case, provides as follows:

> SEC. 21. (a) A compensation order shall become effective when filed in the office of the deputy commissioner as provided in section 19, and, unless proceedings for the suspension or setting aside of such order are instituted as provided in subdivision (b) of this section, shall become final at the expiration of the thirtieth day thereafter.
>
> (b) If not in accordance with law, a compensation order may be suspended or set aside, in whole or in part, through injunction proceedings, mandatory or otherwise, brought by any party in interest against the deputy commissioner making the order, and instituted in the Federal district court for the judicial district in which the injury occurred (or in the Supreme Court of the District of Columbia if the injury occurred in the District). The orders, writs, and processes of the court in such proceedings may run, be served, and be returnable anywhere in the United States. The payment of the amounts required by an award shall not be stayed pending final decision in any such proceeding unless upon application for an interlocutory injunction the court, on hearing, after not less than three days' notice to the parties in interest and the deputy commissioner, allows the stay of such payments, in whole or in part, where irreparable dam-

age would otherwise ensue to the employer. The order of the court allowing any such stay shall contain a specific finding, based upon evidence submitted to the court and identified by reference thereto, that such irreparable damage would result to the employer, and specifying the nature of the damage.

(c) If any employer or his officers or agents fails to comply with a compensation order making an award, that has become final, any beneficiary of such award or the deputy commissioner making the order, may apply for the enforcement of the order to the Federal district court for the judicial district in which the injury occurred (or to the Supreme Court of the District of Columbia if the injury occurred in the District). If the court determines that the order was made and served in accordance with law, and that such employer or his officers or agents have failed to comply therewith, the court shall enforce obedience to the order by writ of injunction or by other proper process, mandatory or otherwise, to enjoin upon such person and his officers and agents compliance with the order.

(d) Proceedings for suspending, setting aside, or enforcing a compensation order, whether rejecting a claim or making an award, shall not be instituted otherwise than as provided in this section and section 18.

STATEMENT

This suit was brought in the United States District Court for the Southern District of Alabama by Charles Benson, the owner of a barge, under Section 21 (b) of the Longshoremen's and Harbor Workers' Compensation Act, to set aside an award made by the deputy commissioner of the United States Employees' Compensation Commission in favor of J. B. Knudsen, who was injured on the barge.

The claimant, Knudsen, while working on the barge which was moored in the navigable waters of the Mobile River, was seriously injured by certain tackle giving away. (R. 1.) Knudsen filed a claim for compensation before the deputy commissioner under authority of the Longshoremen's and Harbor Workers' Compensation Act. (R. 4.) Benson filed an answer denying the relationship of employer and employee at the time of the injury and denying liability for the payment of compensation. (R. 6.) At the hearing before the deputy commissioner Knudsen testified that he was employed by Benson and that while under such employment the injuries were sustained (R. 122–126, 131); and other testimony on his behalf was to the same effect. (R. 100–113, 135.) The evidence of Benson and other witnesses on his behalf was to the effect that Knudsen was not in the employ of Benson at the time the injuries were sustained. (R. 153–167.)

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After a full hearing on the merits before the deputy commissioner, at which both sides were represented, and witnesses were produced and examined by each side (R. 100–176), the deputy commissioner made findings of fact sustaining the contention of Knudsen that he was in the employ of Benson at the time of the accident (R. 83), and made an award in favor of the injured employee (R. 84).

Benson then filed a bill in equity in the United States District Court under Section 21 (b) of the Act, seeking to have the award set aside on the ground that it was not in accordance with law, in that Knudsen was not in his employ at the time of the injury. (R. 1–4.) The District Judge transferred the suit to the admiralty side of the court (R. 26), and after holding a trial *de novo* (R. 28–83), entered a decree setting aside the award of the deputy commissioner and permanently enjoining its enforcement (R. 176). There was filed in evidence the record made before the deputy commissioner, but this was not considered by the District Judge (R. 176), who upon the evidence taken *de novo* found, contrary to the finding of the deputy commissioner, that Knudsen was not in the employ of Benson (R. 177).

The District Court held that unless the statute provided for a trial *de novo* the "act was beyond the power of Congress and is void" (R. 23), and that in order to hold the Act constitutional and not in

violation of Article III, Section 2 of the Constitution, and of the Fifth Amendment, it must follow that the District Court may disregard entirely the proceedings before the deputy commissioner and hear the case as upon an original proceeding or as a trial *de novo* (R. 20, 25).

The Circuit Court of Appeals held that there was a right of trial *de novo* in the District Court on the admiralty side and that there was evidence taken *de novo* before the District Court which supported that court's finding that the injured claimant was not in the employ of the barge owner when his injuries were sustained. Accordingly, it affirmed the rulings of the District Court. (R. 185–191.)

SPECIFICATION OF ERRORS

The Circuit Court of Appeals erred—

I. In holding there was a right of a trial *de novo* in the District Court and that the Act was unconstitutional unless there was that right.

II. In holding that the injunction proceeding authorized by the Act should be heard in admiralty rather than in equity.

SUMMARY OF ARGUMENT

I

In the second decade of the present century workmen's compensation laws were generally adopted by the States, and this Court in numerous decisions sustained their validity. But very shortly after

the adoption of these State compensation laws it developed that they could not be applied to injuries which occurred within the admiralty jurisdiction of the United States. *Southern Pacific Co. v. Jensen*, 244 U. S. 205. Accordingly, Congress passed the Longshoremen's and Harbor Workers' Compensation Act, designed to extend the benefits of compensation to workmen in maritime industries.

The present case concerns the validity of a provision in the Longshoremen's and Harbor Workers' Compensation Act which provides for prompt administrative determination and allowance of compensation subject to review in the courts on question of law only. Unless this provision is valid, the time required for the final determination of the average compensation award will be greatly increased and the Act will have fallen far short of its mark.

II

Section 21 of the Longshoremen's and Harbor Workers' Compensation Act provides that an award may be suspended or set aside "if not in accordance with law." The language of this provision was adopted from Section 1003 (b) of the Revenue Act of 1926, relating to review of the decisions of the Board of Tax Appeals by the Circuit Courts of Appeals. It is settled that under this provision the Board's determinations of fact, when supported by the evidence, are conclusive. There is

no room for any other construction of the same words as they are used in the Longshoremen's and Harbor Workers' Compensation Act. Although we believe that this alone is sufficient to make the proper construction of the phrase "if not in accordance with law" wholly free from doubt, there are numerous other considerations which dictate the same conclusion.

The statute provides in detail for an administrative trial resulting in a determination of fact and law and the making of a compensation order which may be reviewed in the District Court if it be not in accordance with law. Even in that event the court may only suspend or set aside the award, and there is no power in the court to enter a compensation order of its own. In this legislative scheme there can be no place for the trial of the issues *de novo*. Under the ruling of the court below the administrative provisions of the Act would become wholly ineffective.

III

Section 21 of the Longshoremen's and Harbor Workers' Compensation Act is not contrary to any provision of the Constitution because it limits the District Court to a consideration of the findings made by the deputy commissioner on the evidence presented before him. The due process clause of the Fifth Amendment is fully satisfied by the provision for a hearing before an administrative tribunal and for a judicial review of the admin-

istrative determination if that determination is "not in accordance with law."

"Due process of law" does not require that all proceedings relating to liberty or property must be proceedings in a court. Numerous decisions of this Court sustain this conclusion.

Statutes frequently provide that administrative findings of fact if supported by testimony shall be conclusive. In many decisions of this Court statutes of this type have been applied and in other decisions findings of administrative bodies have been held conclusive even though the statutes involved did not explicitly so provide.

These decisions make it clear that there is nothing in the Constitution establishing a universal rule that there must be a trial *de novo* in the courts in all suits to set aside decisions made by administrative authorities. The order of compensation by a deputy commissioner under the Longshoremen's and Harbor Workers' Compensation Act and the finding of fact upon which the order is made are not different in substance from findings and orders made by the Federal Trade Commission, the Interstate Commerce Commission, or other administrative bodies. If there is substantial evidence to support the order, the findings of the deputy commissioner are conclusive. There is no contention here that the findings of the deputy commissioner do not find support in the evidence which was presented before him.

The court below relied on several decisions of this Court to support its conclusion that the Constitution required a trial *de novo* in the instant case. Among others *Ohio Valley Water Co.* v. *Ben Avon Borough,* 253 U. S. 287, and *Ng Fung Ho* v. *White,* 259 U. S. 276, were cited. We submit that none of these decisions requires the result reached in the instant case.

In the *Ohio Valley Water Co. case,* and in the cases which have followed it, this Court has determined that due process of law requires that there be afforded an opportunity for a judicial review both on the law and the facts of an order of a commission which is functioning in a legislative capacity. But it is, of course, clear that the *Ohio Valley Water Co. case* did not overrule the great mass of decisions arising in other fields of administrative activity in which it has been held that determinations of fact may be made conclusive when they are supported by the evidence. Many such decisions have been rendered by this Court since the decision of the *Ohio Valley Water Co. case.* In the present case the administrative proceedings were not legislative in character but were brought to determine a present liability based upon past facts and existing legislation. In such a case the administrative body acts in a *quasi*-judicial capacity, and under the numerous decisions of this Court its conclusions on the facts, when supported by the evidence, may properly be made conclusive.

In *Ng Fung Ho* v. *White, supra,* it was held that a person claiming to be a citizen, who had been ordered deported by the Secretary of Labor, was entitled to a judicial determination of his citizenship. We do not feel that this decision is in any way controlling in the present case. The question of citizenship was there regarded as a jurisdictional question. But here, we submit, there is no possible question of the jurisdiction of the deputy commissioner. Furthermore, the field in which the administrative action was taken in the *Ng Fung Ho case* is wholly different from that involved in the present case. The administrative action in the present case is in a field in which this Court and other courts have uniformly held that administrative determination of facts, when supported by evidence, may constitutionally be made conclusive. In *New York Central Railroad Co.* v. *White,* 243 U. S. 188, this Court upheld a State workmen's compensation law, although it contained provisions for the finality of administrative determinations of fact. This result is further supported by numerous Federal and State decisions in which the findings of fact of workmen's compensation commissions have been held conclusive.

The precise question involved in this case has been considered in many lower Federal Courts in cases arising under the Longshoremen's Act. In every case other than the instant case the contention which we now make has been sustained.

A great majority of the State workmen's compensation acts expressly provide that the adminis-

trative findings of fact made in proceedings under the Act shall be final. Apparently without a single exception such provisions have been held valid and constitutional by the State courts. The decisions reaching this result are too numerous to catalogue. For the most part the State courts have regarded the question as so clear as not to merit discussion and, indeed, it has generally been so regarded since the time of the earliest workmen's compensation laws. In at least two of the State cases arising under compulsory workmen's compensation laws the same argument as that advanced here (based on *Ohio Valley Water Co.* v. *Ben Avon Borough,* 253 U. S. 287) has been carefully considered and rejected. *Nega* v. *Chicago Railways Co.,* 317 Ill. 483; *Helfrick* v. *Dahlstrom Metallic Door Co.,* 256 N. Y. 199.

Both courts below found some basis for their conclusions in the fact that the cause of action arose within the admiralty jurisdiction of the United States. The Circuit Court of Appeals apparently based its conclusion that the deputy commissioner lacked authority to make conclusive findings of fact in part at least upon the contention (R. 187) that the admiralty jurisdiction "is vested exclusively in constitutional Federal courts." But there is no basis either in the Constitution or in the decisions of this Court for the contention that the Federal district courts sitting in admiralty are the only tribunals competent to consider compensation for injuries sustained on navigable waters. When the injury is such that it is a matter of merely local

concern, compensation may be had under the State compensation laws and the award may be made by the administrative tribunals created by the State. Seamen injured on navigable waters may recover under the Jones Act in actions at law commenced in the State Courts. It has long been established that when the remedy sought is *in personam,* even though the suit arise upon a maritime contract or is brought to recover for a maritime tort, "the party seeking redress may proceed by libel in the District Court, or he may, at his election, proceed in an action at law, either in the Circuit Court * * * or in a State court * * *." *Steamboat Co.* v. *Chase,* 16 Wall. 522, 533.

Undoubtedly Congress has power to alter the maritime law. It has done so in the Jones Act extending the Federal Employers' Liability Act to seamen, and more specifically it has done so in the Longshoremen's and Harbor Workers' Compensation Act, where, in the exercise of its power to alter the Maritime Law by statutes of general application it has provided that awards of compensation for injuries to longshoremen and harbor workers shall be made by administrative officers with review by the courts on questions of law only. There is no reason for denying the power of Congress to provide for administrative action in controversies which would otherwise come before admiralty courts, simply because the judicial power also extends to "all Cases of admiralty and maritime Jurisdiction." The correctness of this conclusion is

plainly indicated by the opinion of this Court in *Washington* v. *Dawson & Co.*, 264 U. S. 219, 227.

ARGUMENT

I

PRELIMINARY STATEMENT

One of the chief problems in the field of industrial relations at the beginning of the present century was the question of the proper method of distributing the losses incident to the operation of modern industry. Dissatisfaction with the common law solution of the problem was widely felt. As a result, the coming of the second decade of the century saw the general adoption by the States of workmen's compensation laws. These laws provided for compensation to injured employees, irrespective of fault on the part of the employer, and without regard to the common law defenses of contributory negligence, assumption of risk, and the fellow servant rule.

Attacks on the constitutionality of these Acts were rejected by this Court. In *Hawkins* v. *Bleakly*, 243 U. S. 210, and *Middleton* v. *Texas Power & Light Co.*, 249 U. S. 152, this Court sustained the so-called "elective" statutes of Iowa and Texas. And in *New York Central Railroad Co.* v. *White*, 243 U. S. 188; *Mountain Timber Co.* v. *Washington*, 243 U. S. 219; *Lower Vein Coal Co.* v. *Industrial Board*, 255 U. S. 144; and *Madera Sugar Pine Co.* v. *Industrial Commission*, 262 U. S. 499, the compulsory compensation laws of New

York, Washington, Indiana, and California were held valid. Many States adopted similar statutes, thus recognizing the widespread demand for this method of distributing the loss attributable to industrial accidents. In general, these laws were comprehensive in their nature, applying with few exceptions to all workmen engaged in industry throughout the respective States.

But very shortly after the adoption of these State compensation laws it developed that there was a field of industry of considerable size to which they could not be applied. In *Southern Pacific Co.* v. *Jensen,* 244 U. S. 205, it was held that the provisions of the New York compensation law could not be applied to stevedores who had been killed on board a vessel in New York Harbor within the admiralty jurisdiction of the United States. Congress took the view that this decision depended only on the fact that Congress had not expressed its will that State workmen's compensation laws should apply within the admiralty jurisdiction (*cf. Leisy* v. *Hardin,* 135 U. S. 100, with *In re Rahrer,* 140 U. S. 545), and, accordingly, enacted a statute expressing its will that workmen's compensation laws of the States should apply to all injuries within the admiralty jurisdiction. But in *Knickerbocker Ice Co.* v. *Stewart,* 253 U. S. 149, this statute was held to be an unconstitutional delegation of the power of Congress to alter and amend the maritime law; and in *Washington* v. *Dawson & Co.,*

264 U. S. 219, the same result was reached with respect to a subsequent statute by which Congress endeavored to make the State workmen's compensation laws applicable only to longshoremen and harbor workers within the admiralty jurisdiction.

It thus became apparent that if the benefits of workmen's compensation legislation were to be extended to longshoremen and harbor workers, it must be by virtue of a general Federal act applying to all places within the admiralty jurisdiction throughout the country. Following a suggestion made in the opinion of this Court in *Washington* v. *Dawson & Co., supra,*[1] the Longshoremen's and Harbor Workers' Compensation Act was enacted by Congress.[2]

This statute is a comprehensive workmen's compensation law, modelled after the New York State compensation law. (See House Report No. 1190,

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[1] "Without doubt Congress has power to alter, amend or revise the maritime law by statutes of general application embodying its will and judgment. This power, we think, would permit enactment of a general employers' liability law or general provisions for compensating injured employees * * *." *Washington* v. *Dawson & Co.*, 264 U. S. 219, 227.

[2] Mr. O'Connor, of New York, speaking in the House on March 2, 1927 (69 Cong. Rec. 5413), said:

"It has been the effort of all leaders interested in this question of social justice to find a way out of this jurisdictional dilemma. That was clearly pointed out by Mr. Justice McReynolds in the recent case of *The State of Washington* v. *Dawson* (264 U. S. 219). The court there stated that Congress had the power to protect these workmen, and this bill carries out the suggestion of our highest court."

69th Congress, 1st Sess., p. 2.) It is said that the New York law was used as a model because a considerable majority of the workmen affected by it are employed in New York.

By Section 39 of the Act its administration was entrusted to the experienced United States Employees' Compensation Commission. The Commission appoints the deputy commissioners before whom the hearings are held and who make the awards. The Commission is also authorized to make rules and regulations for the administration of the Act. Under this authority, the Commission issues instructions to the deputy commissioners,[3] it has published a series of opinions for their guidance, and it exercises a constant supervision over their work.[4]

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[3] For example, instructions were issued June 18, 1927, establishing compensation districts, on September 28, 1927, and December 10, 1927, relating to the form of award to be made when compensation is granted or denied, and including the requirement that the deputy commissioner make a specific finding of the facts, and on May 15, 1928, relating to the procedure to be followed by the deputy commissioners in the case of suits brought against them under the Act, and to the procuring of the assistance of the United States attorneys in such cases.

[4] By the Act of May 17, 1928, c. 612, 45 Stat. 600, the provisions of the Longshoremen's and Harbor Workers' Compensation Act are made applicable to employees within the District of Columbia. In other words, the Longshoremen's and Harbor Workers' Compensation Act is now the Workmen's Compensation Act for the District of Columbia, and the decision of the present case will be applicable to employees within the District as well as to those within the admiralty jurisdiction.

The purposes of workmen's compensation legislation were primarily two. Perhaps the most important of these was to impose upon the employer liability for compensation irrespective of fault in place of the common law action for negligence and its traditional defenses. But another purpose of much moment was to insure speed and certainty in payment of compensation to injured workmen. The common law system frequently resulted in great delays and considerable expense. Experience had shown that often as great hardship was caused by the delay in recovering damages as from the injury itself. In order to correct these evils workmen's compensation laws set up an administrative tribunal which it was hoped would be able to adjust disputes concerning compensation in a fair and expeditious manner.

The present case concerns the validity of a provision in the Longshoremen's and Harbor Workers' Compensation Act which was designed to facilitate the prompt determination of suits arising under the Act. Unless this provision that court review of the administrative award shall be confined to questions of law only is valid, the time required for the final determination of the average compensation award will be greatly increased and the Act will have fallen far short of its mark.

The provision that the administrative determination of fact shall be conclusive in the courts, when it is supported by evidence, is found in a great majority of the State workmen's compensation

laws. The State courts have without exception upheld such provisions. For fifteen years the books have been full of such cases.[5]

In at least two instances this Court has considered State workmen's compensation laws which contained provisions that administrative findings of fact should be final. In *New York Central Railroad Co.* v. *White,* 243 U. S. 188, the validity of the New York compulsory Workmen's Compensation Law was upheld. In the opinion reference was made to the fact that the decision of the Commission was subject to an appeal to the courts (p. 194) "on questions of law only," and it was said (pp. 207–208):

> No question is made but that the procedural provisions of the act are amply adequate to afford the notice and opportunity to be heard required by the Fourteenth Amendment.

In *Booth Fisheries Co.* v. *Industrial Commission of Wisconsin,* 271 U. S. 208, it was sought to present to this Court the precise question which is now being urged. But that case arose under the Wisconsin Compensation Act, which is a so-called elective Act, and this Court held that since the employer had elected to proceed under the Act he could not challenge the constitutionality of the provision making the Commission's findings of fact conclusive.[6]

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[5] Some of these cases are cited in note 12, *infra*, p. 42.

[6] This decision was followed in the *per curiam* decision in *Pierce* v. *Barker*, 274 U. S. 718.

In the present case the question is directly presented under a compulsory compensation act. We submit that the statute properly interpreted does not authorize a trial *de novo* of the facts before the District Court and that as so interpreted the statute is constitutional.

II

THE STATUTE DOES NOT REQUIRE OR AUTHORIZE A TRIAL DE NOVO

Section 21 of the Longshoremen's and Harbor Workers' Compensation Act (*supra*, pp. 3–4) provides that:

> If not in accordance with law, a compensation order may be suspended or set aside, in whole or in part, through injunction proceedings, mandatory or otherwise, brought by any party in interest against the deputy commissioner making the order, * * *.

Thus, the only ground on which a compensation order may be set aside is that it is "not in accordance with law."

The language of this section was adopted from the statutory provisions for review of the decisions of the Board of Tax Appeals by the Circuit Courts of Appeals. By Section 1003 (b) of the Revenue Act of 1926 it is provided that the Circuit Courts of Appeals shall have power to modify or to reverse the decision of the Board, "if the decision of the Board is not in accordance with law." It is settled that under this provision the Board's determinations of fact, when supported by evidence, are

conclusive. *Phillips* v. *Commissioner,* 283 U. S. 589; *Old Colony Trust Co.* v. *Commissioner,* 279 U. S. 716; *Avery* v. *Commissioner,* 22 F. (2d) 6 (C. C. A. 5th); *American Savings Bank & Trust Co.* v. *Burnet,* 45 F. (2d) 548 (C. C. A. 9th); *Nichols* v. *Commissioner,* 44 F. (2d) 157 (C. C. A. 3d); *Bedell* v. *Commissioner,* 30 F. (2d) 622 (C. C. A. 2d). There is no room for any other construction of the same words as they are used in the Longshoremen's and Harbor Workers' Compensation Act. Although we believe that this alone is sufficient to make the proper construction of the phrase "if not in accordance with law" wholly free from doubt, there are numerous other considerations which dictate the same conclusion.

Plainly the statute can not mean that the legality of an administrative order is to be tested by new proofs subsequently taken in court. The legality of the compensation order must depend upon the evidence taken in the administrative proceeding, and proofs subsequently taken can have no relevancy to the only question open to inquiry before the District Court. Had Congress intended a trial *de novo* in the District Court the jurisdiction of the court would not have been limited to consideration of the legality of the administrative order. The words "if not in accordance with law," which plainly limit the power of the court to "suspend or set aside" the order, like the words "as the facts and law of the case may warrant" under consideration in *Ma-King Co.* v. *Blair,* 271 U. S. 479, 483,

merely give the court authority to determine whether the order is based upon an error of law, is wholly unsupported by the evidence, or is arbitrary or capricious. The language does not permit reconsideration of controverted questions of fact either upon the administrative record or by trial *de novo* in the District Court. Conclusive effect must be given to the administrative determinations of fact if they are supported by the evidence, and judicial review is limited to the legality of the administrative order. This interpretation, plain enough as we see it from the words which define and limit the authority of the court to suspend or set aside an order, is strongly supported by the frame and purpose of the Act as a whole.

The purpose of the Longshoremen's and Harbor Workers' Compensation Act is to extend to workers upon the navigable waters of the United States, who can not be protected by State legislation, the benefits of a compulsory compensation system for disability or death resulting from injury received in the course of their employment. One of the benefits of the Act is that it eliminates the delay and expense incident to litigation. This benefit would be lost if the issues of fact as well as of law must be tried twice. If such were the law, the courts would be appealed to in practically every contested case, counsel would be as necessary as formerly, and the provisions for hearing before the deputy commissioner, instead of eliminating the delay of litigation

would be a useless waste of time. This, we submit, was not the intention of Congress.

Other sections of the Act support the same conclusion. Sections 14 and 18–28 of the Act provide in detail the powers and duties of the deputy commissioner in making an award. Section 22 provides for modification of an award by the deputy commissioner on his own initiative or on application of an interested party under the procedure of Section 19. Section 23 provides that the deputy commissioner on a hearing is not bound by common law or statutory rules of evidence or by technical or formal rules of procedure except as specifically provided in the Act. Sections 24 and 25 provide for the attendance of witnesses, the taking of testimony by deposition, and the payment of witnesses. Section 27 provides that the deputy commissioner shall have power to preserve and enforce order during any such proceedings; to issue subpoenas for, to administer oaths to, and to compel the attendance and testimony of witnesses or the production of documents, records, and other evidence; to examine witnesses and to do all things conformable to law which may be necessary to enable him to discharge the duties of his office and arrive at a proper conclusion as to whether an award is payable for the alleged injury. Under the Act the deputy commissioner is given broad powers for determining all questions affecting the merits of any claim filed before him by an injured employee. (Sec. 19 (a)).

It can not be that Congress intended all this as a mere rehearsal for a trial *de novo* in the District Court.

The statute plainly provides in detail for an administrative trial resulting in a determination of fact and law, and the making of a compensation order which may be reviewed in the District Court if it be not in accordance with law. Even in that event the court may only suspend or set aside and there is no power in the court to enter a compensation order of its own. In this legislative scheme there can be no place for a trial of the issues *de novo*. Under the ruling of the court below the administrative provisions of the Act would become wholly ineffective.

A speedy determination of the rights of an injured longshoreman without the usual delays incident to litigation in the courts was undoubtedly intended. Section 19 of the Act provides that within ten days after a claim is filed before him, the deputy commissioner shall notify the interested parties that such claim has been filed, and if a hearing on the claim is ordered by the deputy commissioner notice shall be given the interested parties at least ten days in advance of such hearing and the deputy commissioner must, within 20 days after such hearing, reject the claim or make an award. Section 21 provides that a compensation order shall become final within thirty days unless there is filed within that period injunction proceedings in the United States District Court as provided in Section

21 (b). All the provisions of the Act dealing with the manner in which a remedy is given to an injured employee and the limited time within which action must be taken indicate a clear intention on the part of Congress that the facts should be speedily determined by the deputy commissioner so that compensation may be awarded without the delay usually incident to litigation in the courts. The interests of the adverse party before the deputy commissioner are properly protected under Section 21 (b), which provides that the order of the deputy commissioner may be set aside if not made in accordance with law, and the action to be taken by the courts is confined within those limits. If there is evidence before the deputy commissioner to sustain his award, the District Court should affirm the award without holding a trial *de novo*.

III

THE STATUTE AS SO CONSTRUED IS CONSTITUTIONAL

A. It does not violate the due process clause of the Fifth Amendment.

Section 21 of the Longshoremen's and Harbor Workers' Compensation Act is not contrary to any provision of the Constitution because it limits the District Court to a consideration of the evidence presented before the deputy commissioner and his findings made on that evidence. The due process clause of the Fifth Amendment is fully satisfied by the provision for a hearing before an administrative tribunal and for a judicial review

of the administrative determination if that determination is "not in accordance with law."

"Due process of law" does not require that all proceedings relating to liberty or property be proceedings in a court. In *Reetz* v. *Michigan*, 188 U. S. 505, 507, this Court said that—

> we know of no provision in the Federal Constitution which forbids a state from granting to a tribunal, whether called a court or a board of registration, the final determination of a legal question. Indeed, it not infrequently happens that a full discharge of their duties compels boards, or officers of a purely ministerial character, to consider and determine questions of a legal nature. Due process is not necessarily judicial process.

And in *Weimer* v. *Bunbury*, 30 Michigan 201, 211, Judge Cooley said:

> There is nothing in these words ["due process of law"], however, that necessarily implies that due process of law must be judicial process. Much of the process by means of which the government is carried on and the order of society maintained is purely executive or administrative.

In *Long Island Water Supply Co.* v. *Brooklyn*, 166 U. S. 685, 695, this Court said that—

> there is no denial of due process in making the findings of fact by the triers of fact, whether commissioners or a jury, final as to such facts, and leaving open to the courts simply the inquiry as to whether there was

> any erroneous basis adopted by the triers in their appraisal, or other errors in their proceedings.

The rule was recently summarized in the opinion of this Court in *Phillips* v. *Commissioner of Internal Revenue*, 283 U. S. 589, 600. It was there said:

> It has long been settled that determinations of fact for ordinary administrative purposes are not subject to review. * * * Save as there may be an exception for issues presenting claims of constitutional right,[7] such administrative findings on issues of fact are accepted by the courts as conclusive if the evidence was legally sufficient to sustain them and there was no irregularity in the proceedings.

In numerous instances Congress has expressly provided by statute that administrative findings of fact when supported by evidence shall be conclusive. Thus, in Section 5 of the Federal Trade Commission Act (Act of September 26, 1914, c. 311, 38 Stat. 717, 720; U. S. C., Title 15, Sec. 45) it is provided that:

> The findings of the commission as to the facts, if supported by testimony, shall be conclusive.

The same provision is found in Section 11 of the Clayton Act (Act of October 15, 1914, c. 323, 38

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[7] The contention that the present case is one presenting an issue of constitutional right and thus within the exception to the general rule that administrative determinations of fact may be made final is considered, *infra*, pp. 36-37.

Stat. 730, 735; U. S. C., Title 15, Sec. 21). In the antidumping provisions contained in Section 316 (c) of the Tariff Act of 1922, c. 356, 42 Stat. 858, 944 (U. S. C., Title 19, Sec. 176), it is provided, with respect to the findings of the Board of General Appaisers, that—

> Such findings, if supported by evidence, shall be conclusive, except that * * * an appeal may be taken from said findings upon a question or questions of law only to the United States Court of Customs Appeals * * *.

This provision was reenacted in Section 337 (c) of the Tariff Act of 1930, c. 497, 46 Stat. 590, 704 (U. S. C. Sup. IV, Title 19, Sec. 1337 (c)). And in the Act of July 1, 1930, c. 788, 46 Stat. 844 (U. S. C. Sup. IV, Title 47, Sec. 96), amending Section 16 of the Radio Act of 1927, relating to review of decisions of the Federal Radio Commission by the Court of Appeals of the District of Columbia, it is provided that "the review by the court shall be limited to questions of law and * * * findings of fact by the commission, if supported by substantial evidence, shall be conclusive * * *."

In many decisions of this Court statutes of this type have been applied, and in other decisions findings of administrative bodies have been held conclusive, even though the statutes involved did not explicitly so provide. Thus, as to the Federal Trade Commission, this Court said in *Federal*

Trade Commission v. *Curtis Publishing Co.*, 260 U. S. 568, 580:

> Manifestly, the court must inquire whether the Commission's findings of fact are supported by evidence. *If so supported, they are conclusive.* (Italics ours.)

The same rule was announced as to proceedings by the Federal Trade Commission under the Clayton Act in *International Shoe Co.* v. *Federal Trade Commission*, 280 U. S. 291, 297.

Other cases in which this Court has held that administrative findings of fact affecting property rights or the liberty of the individual may be made conclusive when supported by the evidence are very numerous. Thus, the courts will not review the findings of fact of the Interstate Commerce Commission by passing upon the credibility of witnesses or the effective weight of testimony. See, *e. g.*, *Interstate Commerce Commission* v. *Delaware Railroad*, 220 U. S. 235, 251; *Interstate Commerce Commission* v. *Union Pacific Railroad*, 222 U. S. 541; *Interstate Commerce Commission* v. *Louisville & Nashville R. R. Co.*, 227 U. S. 88; *Western Papermakers Chemical Co.* v. *United States*, 271 U. S. 268; *Virginian Railway* v. *United States*, 272 U. S. 658, 663.

It has frequently been held that decisions of heads of executive departments upon questions of fact are final and conclusive. This has been held concerning decisions of the Postmaster General (*Bates & Guild Co.* v. *Payne*, 194 U. S. 106; *Public*

Clearing House v. *Coyne*, 194 U. S. 497); the Secretary of Agriculture (*Houston* v. *St. Louis Independent Packing Co.*, 249 U. S. 479; *Tagg Bros. & Moorehead* v. *United States*, 280 U. S. 420, 443–444); the Secretary of the Interior (*Medbury* v. *United States*, 173 U. S. 492); and the Secretary of Labor and the immigration officials when acting within the scope of their authority (*Nishimura Ekiu* v. *United States*, 142 U. S. 651; *Fong Yue Ting* v. *United States*, 149 U. S. 698; *Lem Moon Sing* v. *United States*, 158 U. S. 538; *United States* v. *Ju Toy*, 198 U. S. 253; *Quon Quon Poy* v. *Johnson*, 273 U. S. 352). The same result has been reached with respect to the determinations of fact of other administrative officials. Thus, the findings of fact of the customs appraisers have been held conclusive. *Passavant* v. *United States*, 148 U. S. 214. The same result has been reached as to the findings of fact of the Land Department (*Smelting Co.* v. *Kemp*, 104 U. S. 636; *Burfenning* v. *Chicago, St. Paul, etc., Ry.*, 163 U. S. 321, 323; *Johnson* v. *Drew*, 171 U. S. 93); the Director of the Veterans' Bureau (*Silberschein* v. *United States*, 266 U. S. 221; *United States* v. *Williams*, 278 U. S. 255), and of the Commissioner of Internal Revenue, both with respect to the issuance of permits under the prohibition laws (*Ma-King* v. *Blair*, 271 U. S. 479, 483), and with respect to the question whether a corporation is entitled to a "special assessment" under the excess profits tax. *Williamsport Wire*

Rope Co. v. *United States*, 277 U. S. 551. Similarly the findings of fact of the Board of Tax Appeals are conclusive upon the courts. *Phillips* v. *Commissioner*, 283 U. S. 589. See also *Old Colony Trust Co.* v. *Commissioner*, 279 U. S. 716.

These decisions make it clear beyond question that there is nothing in the Constitution establishing a universal rule that there must be a trial *de novo* in the courts in all suits to set aside decisions made by administrative authorities. The award of compensation by a deputy commissioner under the Longshoremen's Compensation Act and the finding of facts upon which the award is made are not different in substance from findings and orders made by the Federal Trade Commission, the Interstate Commerce Commission, or other administrative bodies. The Act requires a hearing before the deputy commissioner on the application of any party in interest. The Act confers upon the United States Employees' Compensation Commission power to make rules and regulations for the purpose of carrying out the provisions of the Act, and under those regulations a deputy commissioner is required to make findings of fact in support of his order. The Act fixes the amount of compensation to be awarded in accordance with the rate of wages being received, and in making an order the deputy commissioner is merely administering the provisions of the statute.

The jurisdiction of the District Court under Section 21 (b) is limited to a determination of the

question whether the order is "not in accordance with law." This requires a consideration of the case on the record made before the deputy commissioner. If there is substantial evidence to support the order, the findings of the deputy commissioner are conclusive. There is no contention here that the findings of the deputy commissioner do not find support in the evidence which was presented before him.

The court below relied on several decisions of this Court to support its conclusion that the Constitution required the trial in the District Court in the instant case to be a trial *de novo*. These cases are: *Ohio Valley Water Co.* v. *Ben Avon Borough*, 253 U. S. 287; *Bluefield Co.* v. *Public Service Commission*, 262 U. S. 679, 689; *Lehigh Valley R. R.* v. *Commissioners*, 278 U. S. 24, 37–41; *Liu Hop Fong* v. *United States*, 209 U. S. 453, 461; *Ng Fung Ho* v. *White*, 259 U. S. 276, 284. We submit that none of these decisions requires the result reached in the court below.

These cases show that in this field of law as in so many others it is impossible to generalize. It can not be contended that all administrative determinations of fact on any subject may be validly made conclusive. Yet it is equally clear from the many cases cited in the previous pages of this brief that there is no basis for a contention that no administrative determinations of fact may constitutionally be made conclusive. The problem here as elsewhere

is where to draw the line. We believe that the true rule to be gathered from the cases is that the scope of the "judicial review" required, that is the degree to which the administrative determination may be made conclusive, depends upon the nature of the field in which the administrative action takes place.[6] We propose to show that the cases relied upon by the court below arose in fields so different from that involved in the present case that they can have no application here. And we further propose to show that an order of a commissioner awarding compensation for an industrial accident is an action taken in a field in which this Court and other courts have uniformly held that the administrative finding of facts may validly be made conclusive.

The first three cases relied on by the court below deal with the power of administrative bodies to establish rates or otherwise to provide rules for future conduct, that is, to legislate. In determining a rate under which a public utility must operate in the future, a commission is operating as the delegate of the legislature and is performing a function which but for its complexity would be performed by the legislature.[7] That the order of a commission establishing a rate is essentially legislative in

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[6] See Dickinson, Administrative Justice and the Supremacy of Law (1927) pp. 69–75; Frankfurter, *The Task of Administrative Law* (1927) 75 U. of Pa. L. Rev. 614, 619–20.

[7] Thus, the Congress has recently by statute prescribed the fare to be charged school children on the street railways of the District of Columbia. Act of February 25, 1931, c. 302, 47 Stat. 1419.

its character has long been recognized. Thus, in *Prentis* v. *Atlantic Coast Line*, 211 U. S. 210, 226, this Court said:

> The establishment of a rate is the making of a rule for the future, and therefore is an act legislative not judicial in kind * * *.

In the *Ohio Valley Water Co. case* and the cases which have followed it, this Court has determined that due process of law requires that there be afforded an opportunity for a judicial review both on the law and the facts of an order of a commission which is functioning in a legislative capacity in determining a rate. An act of the legislature would necessarily be subject to review in the courts if the issue of confiscation were raised against it and the decision in the *Ohio Valley case* is simply that a legislative rate-making order of a commission must be subject to the same review as an act of the legislature.

But it is, of course, clear that the *Ohio Valley Water Company case* did not overrule decisions arising in other fields of administrative activity in which it has repeatedly been held that determinations of fact may be made conclusive when they are supported by evidence. Indeed, many such decisions have been announced by this Court since the decision of the *Ohio Valley Water Company case*.[10]

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[10] *E. g.*, *Federal Trade Commission* v. *Curtis Publishing Co.*, 260 U. S. 568, 580; *Virginian Railway* v. *United States*, 272 U. S. 658, 663; *United States* v. *Williams*, 278 U. S. 255; *Tagg Bros. & Moorehead* v. *United States*, 280 U. S. 420, 443-444; *Phillips* v. *Commissioner*, 283 U. S. 589.

In the present case the administrative proceedings were not legislative in character but were brought to determine a present liability based on past facts and existing legislation. In such a case the administrative body is sitting in a *quasi*-judicial capacity and under the numerous decisions of this Court, heretofore referred to, its conclusions on the facts when supported by evidence may properly be made conclusive.

It may be contended that the *Ohio Valley Water Company case* is based on "confiscation," and that there is likewise "confiscation" when, as in the present case, an administrative officer orders a payment of money to be made by one person to another. Such an order based upon a finding of fact upon which the law predicates liability is not confiscation in any true sense of that term. But passing the obvious confusion of terms, much administrative action involves the loss of property to some one. Nevertheless, this Court has frequently held that administrative determinations of fact in such cases may be conclusive. The distinction involved between the *Ohio Valley Water Company case* and such cases, we submit, does not depend upon the deprivation of property but upon whether the administrative order is legislative in character, providing a rule for future conduct, or is *quasi*-judicial in character, establishing a liability based upon past events.

The distinction between the *Ohio Valley Water Company* case and cases such as the present lies

in the nature of the controversy involved. The determination of rates for public utilities is a question of great complexity, depending upon a great many factors, very few of which can be isolated as questions of law or as questions of fact. Thus, one of the factors is the value of the utility. But it is clear that determination of the value of a utility involves consideration of difficult questions of law as well as of questions of fact. In such a controversy, it is virtually impossible to separate questions of law from questions of fact. To make the administrative determination of such a question conclusive would be to deprive the utility of its day in court. This Court has accordingly determined that in a rate-making controversy a utility is entitled to an independent judicial review of the entire question.

But in the present case the issues before the administrative officer are entirely different. They are relatively simple, and they present for the most part pure questions of fact—whether a particular event in the past did or did not occur. Such questions are particularly appropriate for determination by an administrative officer. For centuries we have had such questions of fact determined by laymen on juries, subject only to the supervision of a court as to the law. The citizen is amply protected by the provision for a review of the administrative order in court in case the order is arbitrary or fraudulent, without any foundation in the evidence, or otherwise "not in accordance with law."

The *Liu Hop Fong case,* relied on by the court below, is clearly no more than a determination that the statute involved in that case by its terms provided for a trial *de novo* on an appeal to the District Court. A decision under such a statute, of course, has no bearing on the constitutionality of a statute which provides that the administrative determination of fact shall be final.

The final case relied upon by the court below is *Ng Fung Ho* v. *White,* 259 U. S. 276. It was there held that a person, claiming to be a citizen, who had been ordered deported by the Secretary of Labor, was entitled to a judicial determination of his citizenship. We do not regard this decision as controlling in the present case. The question of citizenship was there considered to be jurisdictional, because, if the person involved was a citizen, the Secretary of Labor was wholly without authority to order his deportation. Of course, administrative determinations are valid only when they are made within the power which has been conferred. The determination of the question whether the administrative officer has exceeded his authority is essentially a question of law subject to review in the courts. No such question arises in this case. The statute defines the commissioner's jurisdiction. It grants "full power and authority to hear and determine all questions" in respect of the claim for compensation. (Sec. 19 (a).) It follows that Knudson's assertion of employment, made in his claim and disputed by Benson, presented a question which

the commissioner had power—that is, jurisdiction—to determine. There was nothing inherent in the nature of this issue to distinguish it from other questions of fact which may constitutionally be left to administrative determination.

Just as the *Ohio Valley case* is distinguishable because of the nature of the question there presented, so is the *Ng Fung Ho case* distinguishable from the instant case. An administrative order of deportation is a matter of the utmost moment to the person concerned. Deportation of a citizen is unlawful exile, an intolerable injustice in modern times. Before so serious a consequence is visited upon one claiming to be a citizen, the least a civilized State can do is to afford him the opportunity to establish the fact of citizenship in a court of justice before the order for his deportation is made final. That the rule is limited in its application to the claim of citizenship is clear from the many decisions which support the general rule that determinations of all other fact questions in deportation and exclusion cases under our immigration laws are not disturbed by the courts if supported by evidence taken in the administrative proceedings. Clearly *Ng Fung Ho* v. *White, supra,* can not rule the decision in this case. At the time Knudsen was employed, Benson had notice through the Longshoremen's and Harbor Workers' Compensation Act that such a liability might be imposed. The liability was a risk incidental to his business. He could, and under Sec-

tion 32 of the Act should, have insured against it, and to a certain extent wages and prices could have been adjusted accordingly.

The field in which the administrative action taken in the present case lies is a field in which this Court and other courts have uniformly held that the administrative determination of the facts when supported by evidence may constitutionally be made conclusive. Reference has already been made (*supra*, p. 15) to the decisions of this Court in *New York Central Railroad Co.* v. *White*, 243 U. S. 188, and other cases, in which State workmen's compensation laws were held constitutional although they contained provisions for the finality of administrative determinations of fact. Probably the present question would never have been raised were it not for the decision in *Ohio Valley Water Co.* v. *Ben Avon Borough*, 253 U. S. 287. We have already contended that this case is not controlling here. That contention is further supported by the overwhelming number of Federal and State decisions in which the findings of fact of workmen's compensation commissions have been held conclusive.

The precise question involved in this case has been considered in numerous lower Federal courts in cases arising under the Longshoremen's and Harbor Workers' Compensation Act. In every case other than the instant case the contention which we now make has been sustained.

The question has been considered by four circuit courts of appeals, other than the court below. The

Circuit Court of Appeals for the Second Circuit in *Wilson & Co.* v. *Locke, Deputy Commissioner,* 50 F. (2d) 81, and the Circuit Court of Appeals for the Fourth Circuit in *Wheeling Corrugating Co.* v. *McManigal, Deputy Commissioner,* 41 F. (2d) 593, held that there is no right of trial *de novo* in the District Court, after considering one or both of the opinions in the case at bar. The Circuit Court of Appeals for the Ninth Circuit in *Northwestern Stevedoring Co.* v. *Marshall, Deputy Commissioner,* 41 F (2d) 28, and the Circuit Court of Appeals for the Third Circuit in *McCahan Company* v. *Norton, Deputy Commissioner,* 43 F (2d) 505, reached the same conclusion and held the Act constitutional.

Except for the decision in this case the district courts have uniformly held that there is no right of trial *de novo* in the district court and that the district court is confined in the consideration of the case to the record made before the deputy commissioner and to the determination of the validity of the administrative award. The cases reaching this result are cited in the footnote.[11]

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[11] *Obrecht-Lynch Corp.* v. *Clark*, 30 F. (2d) 144 (D.Md.); *Merchants' & Miners' Transp. Co.* v. *Norton*, 32 F. (2d) 513 (E. D. Pa.); *Joyce* v. *Deputy Commissioner*, 33 F. (2d) 218 (D. Me.); *Pocahontas Fuel Co.* v. *Monahan*, 34 F. (2d) 549 (D. Me.); *Grays Harbor Stevedore Co.* v. *Marshall*, 36 F. (2d) 814 (W. D. Wash.); *Howard* v. *Monahan*, 31 F. (2d) 480, 33 F. (2d) 220 (S. D. Tex.); *Keyway Stevedoring Co.* v. *Clark*, 43 F. (2d) 983 (D. Md.); *Showers* v. *Crowell*, 46 F. (2d) 361 (W. D. La.); *Jarka Corporation* v. *Monahan*, 48 F. (2d) 283 (D. Mass.); *Todd Dry Docks, Inc.*, v. *Marshall*, 49 F. (2d) 621 (W. D. Wash.).

A great majority of the State workmen's compensation acts expressly provide that administrative findings of fact shall be final. Apparently without a single exception such provisions have been held valid and constitutional by the State courts. The decisions reaching this result are too numerous to catalogue. No effort has been made to present an exhaustive collection of such authorities but a few typical cases are cited in the footnote.[12] These cases of course arise under the Fourteenth Amendment, but no reason is perceived why they are not equally applicable when the question arises under the identical language of the Fifth Amendment.

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[12] Some of the cases so holding are: *Blackenship* v. *Industrial Comm.*, 34 Ariz. 2; *Southwestern Surety Ins. Co.* v. *Pillsbury*, 172 Cal. 768; *Employers' Mutual Ins. Co.* v. *Industrial Comm.*, 65 Colo. 283; *New Jersey Fid. Ins. Co.* v. *Patterson*, 86 Colo. 580; *Montgomery* v. *Maryland Casualty Co.*, 169 Ga. 746; *Jenkins* v. *Boise Payette Lumber Co.*, 49 Idaho 24; *Nega* v. *Chicago Railways Co.*, 317 Ill. 483; *Columbia School Supply Co.* v. *Lewis*, 65 Ind. App. 339; *Star Publishing Co.* v. *Johnson*, 83 Ind. App. 309; *Hazard Blue Grass Coal Corp.* v. *Clemens*, 209 Ky. 486; *Simmons' Case*, 117 Maine 175; *Adams' Case*, 124 Maine 295; *Bischoff* v. *American Car & Foundry Co.*, 190 Mich. 229; *Matter of Heitz* v. *Ruppert*, 218 N. Y. 148; *Helfrick* v. *Dahlstrom Metallic Door Co.*, 256 N. Y. 199; *Williams* v. *Thompson*, 200 N. C. 468; *Choctaw Portland Cement Co.* v. *Lamb*, 79 Okla. 109; *McCarthy* v. *General Electric Co.*, 293 Pa. 448; *Campbell* v. *Eagle & Blue Bell Mining Co.*, 64 Utah 430.

The decisions of the State courts do not distinguish between the compulsory and the so-called elective acts. Of course, the decisions under elective acts, like the decision of this Court in *Booth Fisheries Co.* v. *Industrial Commission*, 271 U. S. 208, are not authority in the present case which arises under a compulsory act.

For the most part the State courts have regarded the question as so clear as not to merit discussion. And, indeed, it has generally been so regarded since the time of the earliest workmen's compensation laws. There is here a practical construction of the constitutional provision too clear to be disregarded. But in at least two of the State cases arising under compulsory workmen's compensation laws, the same argument as that advanced here (based on *Ohio Valley Water Co.* v. *Ben Avon Borough*, 253 U. S. 287) has been carefully considered and rejected.

In *Nega* v. *Chicago Railways Co.*, 317 Ill. 483, it was contended that the Illinois workmen's compensation law was invalid because it provided that the findings of fact of the industrial board should be conclusive. The argument in support of this contention was based upon the *Ohio Valley Water Company case*. In a careful opinion the Supreme Court of Illinois rejected the contention and held that the decision of this Court in the *Ohio Valley Water Company case* was not applicable to the findings of fact of a workmen's compensation commission. The court said (p. 489):

> The *Ben Avon Borough case* appears to base the right to review facts on the proposition that rate-making is a legislative function, in which questions of fact are the only issue and in which the findings are in nowise judicial in character.

* * * * *

> We are cited to no case, and we have been able to find none, holding that a statute which permits judicial review of questions of law, only, arising on the decisions of an administrative body, where its act is in its nature judicial rather than legislative, violates the due process clause of the Federal constitution.

More recently the Court of Appeals of New York in *Helfrick* v. *Dahlstrom Metallic Door Co.*, 256 N. Y. 199, reached the same conclusion. It was there contended that the New York Workmen's Compensation Act was unconstitutional because it provided that the findings of fact of the Industrial Commission, when supported by the evidence, should be conclusive. The court referred to the many decisions in which it has been held that administrative findings of fact, when supported by the evidence, may be made final, and said (p. 207):

> The appellant claims that the case of *Ohio Valley Water Company* v. *Ben Avon Borough* (253 U. S. 287) has modified all this. Such is not the fact. The fixing of rates to be charged by a public service corporation is held by the Federal court to be legislative in nature, and no action of a commission or a public regulating board can deprive the courts of the right and power to determine whether the rate is confiscatory. Such is the *Ben Avon case,* and nothing more. * * * * * * the full force and effect of the due process clause can not be preserved if the rate-making power is removed from

> judicial investigation. So many are the complications in determining the question of fair return that necessity, not theory, has moved the courts to this conclusion.

Because this decision discusses the precise question now under consideration, both clearly and briefly, it is set forth in full as Appendix A of this brief (*infra*, pp. 52–60.)

B. It is not contrary to the grant of judicial power in Article III.

Article III of the Constitution, relating to the judicial power, provides in part:

> The judicial Power of the United States shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. * * *
>
> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their authority;—* * * to all cases of admiralty and maritime Jurisdiction;—* * *.

Both courts below found some basis for their conclusions in the fact that the cause of action arose on navigable waters of the United States. It is difficult to formulate the precise reasoning of the courts on this point, and the only reference to it in the opinion of the Circuit Court of Appeals is the

statement (R. 187) that the admiralty jurisdiction—

> is vested exclusively in constitutional Federal courts, not in legislative courts or tribunals, or in any executive official.

This is true in the sense that no other courts may exercise the judicial powers peculiar to courts of admiralty, but there is no basis either in the Constitution or in the decisions of this Court for the contention that the Federal district courts sitting in admiralty are the only tribunals competent to consider compensation for injuries sustained on navigable waters. When the injury is such that it is merely a matter of local concern, compensation for such an injury may be had under the State compensation laws and the award may be made by the administrative tribunals created by the State. *Grant Smith-Porter Ship Co.* v. *Rohde,* 257 U. S. 469; *Millers' Indemnity Underwriters* v. *Braud,* 270 U. S. 59.[18] Seamen injured on navigable waters may recover under the Jones Act in actions at law commenced in State courts. *Panama Railroad Co.* v. *Vasquez,* 271 U. S. 557; *International Stevedoring Co.* v. *Haverty,* 272 U. S. 50; *Messel*

[18] In this case this Court said (pp. 64–65):

"In the cause now under consideration the record discloses facts sufficient to show a maritime tort to which the general admiralty jurisdiction would extend save for the provisions of the state Compensation Act; * * *. The Act prescribes the only remedy; its exclusive features abrogate the right to resort to the admiralty court which otherwise would exist."

v. *Foundation Co.*, 274 U. S. 427; *Jamison* v. *Encarnacion*, 281 U. S. 635. It has long been established that when the remedy sought is *in personam*, even though the suit arise upon a maritime contract or is brought to recover for a maritime tort, "the party seeking redress may proceed by libel in the District Court, or he may, at his election, proceed in an action at law, either in the Circuit Court * * *, or in a State court * * *." *Steamboat Co.* v. *Chase*, 16 Wall. 522, 533. The right to sue in the State courts at law is expressly saved to suitors by Sections 24(3) and 256 of the Judicial Code (U. S. C., Title 28, Secs. 41(3), 371), a provision which is derived directly from Section 9 of the Judiciary Act of September 24, 1789, 1 Stat. 73, 76–77.

Quite obviously the enactment of the statute here in question was within the power of Congress to alter, amend, or revise the maritime law by statutes of general application. This power is recognized in a long line of decisions of this Court commencing with *The Lottawanna*, 21 Wall. 558, and frequently considered in connection with legislation of Congress providing compensation for longshoremen and harborworkers, as in *Southern Pacific Co.* v. *Jensen*, 244 U. S. 205, 215; *Knickerbocker Ice Co.* v. *Stewart*, 253 U. S. 149, 160; *Washington* v. *Dawson Co.*, 264 U. S. 219, 227. In the latter case it was said:

> Without doubt Congress has power to alter, amend, or revise the maritime law by

> statutes of general application embodying its will and judgment. This power, we think, would permit enactment of a general employer's liability law or general provisions for compensating employees.

It was expressly in the exercise of this power that the statute here in question was enacted. (See p. 17, *supra*.) This legislative power, as defined in the decisions of this Court, is not limited by rules of procedure in a court of admiralty. It extends to the very body of the substantive maritime law, and in its exercise Congress may change old rights and remedies and create new liabilities and new methods for their enforcement. Certainly there is no limitation upon the exercise of this power to be found in the words of the Constitution extending the judicial power of the United States to all cases of admiralty and maritime jurisdiction.

Both courts below seem to have concluded that it was beyond the power of Congress to provide for the review of a compensation order in any court other than a court of the United States exercising admiralty jurisdiction. But there is no such limitation upon the power of Congress to be found in any words of the Constitution. Congress was clearly authorized to adopt any means it thought appropriate for the proper administration of a system of compensation, if it had power to legislate at all. Accordingly, we submit that the court

was in error in directing the transfer of the cause from the Equity to the Admiralty side of the court. Prejudice followed when the questions already determined by the Commissioner were tried again before the Admiralty court, as if it were a court of first instance sitting to hear and determine a suit in admiralty.

CONCLUSION

Experience has shown that the Longshoremen's and Harbor Workers' Compensation Act is an exceedingly effective and efficient method of dealing with the problem of compensation for injuries to employees in maritime industry. During the first three years of the existence of the Act (from July 1, 1927, to July 1, 1930), 109,890 injuries were reported to the deputy commissioners. During this period only 134 suits were filed in the Federal district courts under Section 21 (b) of the Act.[14] Thus, less than one-eighth of 1 per cent of the injuries have resulted in litigation. These figures show that the Longshoremen's Act has operated to relieve Federal and State courts of a large amount of litigation which under the rule of the *Jensen case* had been taken from willing State administrative agencies and placed upon the already overburdened shoulders of the courts.

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[14] These figures are taken from the Annual Reports of the United States Employees' Compensation Commission for the fiscal years ending July 1, 1928, 1929, and 1930. Data for the fiscal year ending July 1, 1931, are not yet available.

There can be no doubt, we believe, that the small amount of litigation is due in large part to the rule followed in every court except the courts below that the trial in the District Court is not a trial *de novo* but is confined to a consideration of the facts found by the deputy commissioner. If the rule adopted by the Circuit Court of Appeals below is sustained, requiring a trial *de novo* in the District Court, there is good reason to believe that the volume of litigation in the Federal courts under the Longshoremen's Act will greatly increase. If an employer or an employee who has lost in the proceeding before the deputy commissioner knows that he may have a complete new trial both as to the law and the facts in the District Court, the temptation for him to try again where he has once failed will be very great. Social experience of the past two decades has shown plainly that the matter of compensation for industrial accidents is best handled by administrative bodies. An affirmance of the judgment below will put more and more of the burden of administering the Longshoremen's Act on the courts, and the consequence will be delay and expense to litigants under the Act, and likewise an increase of delay to other litigants in the Federal courts.

The decision of questions seriously affecting private rights must be committed to some fallible tribunal. Due process of law can rightfully demand no more than that the procedure devised for

reaching this decision give to the individual every opportunity to establish his rights, consistent with maintaining the orderly and efficient administration of Government.

The sole question before the deputy commissioner was a question of fact. There was evidence to support the deputy commissioner's finding, and that finding accordingly should have been held conclusive on the District Court. The judgment of the Circuit Court of Appeals is erroneous and should be reversed.

Respectfully submitted.

THOMAS D. THACHER,
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Attorney.

SEPTEMBER, 1931.

APPENDIX

HELFRICK v. DAHLSTROM METALLIC DOOR CO. ET AL.

(Court of Appeals of New York. May 12, 1931. 256 N. Y. 199)

Appeal from Supreme Court, Appellate Division, Third Department.

Proceeding under the Workmen's Compensation Act by Paul Helfrick, claimant, against the Dahlstrom Metallic Door Company, employer, and the Jamestown Mutual Insurance Company, insurer. From an order of the Appellate Division, Third Department (231 App. Div. 775), affirming an award of the State Industrial Commission for compensation to the claimant, the employer and the insurer appeal. By an amendment to the order (232 App. Div. 710), the Appellate Division overruled the constitutional question raised by the employer, and denied leave to appeal, and stated that affirmance was upon the law.

Order of the Appellate Division affirmed.

CRANE, *J.*

On March 23, 1929, Paul Helfrick, of Jamestown, N. Y., was employed as a blacksmith by Dahlstrom Metallic Door Company, of the same place. While engaged in the regular course of his employment on that day, he accidentally injured his fingers, for which the State Industrial Board has made him an award of $395.41. The employer and the insurance carrier challenge the award on the ground that the

procedure under our State Workmen's Compensation Law (Consol. Laws, c. 67) has or will deprive the employer of his property without due process of law, in that the board has been made the final arbiter of the facts without any review upon the weight of evidence in a court of law.

The Labor Law of the state (Consol. Laws, c. 31), by section 12, provides for an Industrial Board consisting of five members, at least one of whom shall be an attorney and counselor at law duly admitted to practice in the state. The members are appointed by the Governor by and with the advice of the Senate; the term of office being six years. Each member is obliged to take the constitutional oath of office.

The Workmen's Compensation Law, by section 20, gives to this board full power and authority to determine all questions in relation to the payment of claims presented to it for compensation. The board shall make or cause to be made such investigation as it deems necessary, and upon application of either party shall order a hearing, and within thirty days after a claim is submitted shall make an award and file the same in the office of the department. This section further provides as follows:

> The decision of the board shall be final as to all questions of fact, and, except as provided in section twenty-three, as to all questions of law.

Section 23 provides for an appeal to the Appellate Division of the Supreme Court within thirty days after the award or decision is made. The board may also of its own motion certify to such Appellate Division questions of law involved in its

decision. The board shall be deemed a party to every such appeal, and the Attorney General, without extra compensation, shall represent it. From the decision of the Appellate Division an appeal lies to this court where the decision has not been unanimous in the Appellate Division, or the consent of that court or of this court has been obtained. Such appeals are subject to the law and practice applicable to appeals in civil actions.

In *Pine* v. *State Industrial Commission,* 107 Okl. 40 [opinion withdrawn; for corrected opinion, see 108 Okl. 185], and *Public Service Gas Co.* v. *Board of Public Utility Com'rs,* 84 N. J. Law, 463, similar statutory provision, making a decision of a commission final as to the facts, was interpreted to mean final as a termination which ended the proceedings, and therefore did not attempt to take from the courts a constitutional power to review the facts. Although by article 6, § 1, of our State Constitution, the Supreme Court is continued with general jurisdiction in law and equity, subject to such appellate jurisdiction of the Court of Appeals as now is or may be prescribed by law, the same Constitution, subsequent to *Ives* v. *South Buffalo Ry. Co.,* 201 N. Y. 271, was amended by Article 1, section 19, to read as follows:

> Nothing contained in this Constitution shall be construed to limit the power of the Legislature to enact laws for the protection of the lives, health, or safety of employees; or for the payment, either by employers, or by employers and employees or otherwise, * * * of compensation for injuries to employees or for death of employees resulting from such injuries without regard to fault as a cause thereof, * * * for the

> adjustment, determination and settlement, with or without trial by jury, of issues which may arise under such legislation; * * *

This court in 1916 decided in *Matter of Heitz* v. *Ruppert,* 218 N. Y. 148, that the decision of the commission or the State Industrial Board was final on all questions of fact, and such has been the practice in this state ever since that time. The decision by the Board does not take from the courts any of the powers invested in them by the State Constitution as was the instance in the Oklahoma and New Jersey cases above cited. Such limitation of review upon appeal is not illegal under our state form of government.

What, however, is the effect of the Federal Constitution under the due process clause of the Fourteenth Amendment? Our Workmen's Compensation Law was before the United States Supreme Court in *New York Central R. R. Co.* v. *White,* 243 U. S. 188, 194, 207, and the opinion of Mr. Justice Pitney refers to the effect of the decision on the facts by the commission or board. He there stated: "No question is made but that the procedural provisions of the act are amply adequate to afford the notice and opportunity to be heard required by the 14th Amendment." True, the court's attention was addressed to the law as a whole and not particularly to this question of the finality of the board's decision on a question of fact. A similar statute was reviewed in *Mountain Timber Co.* v. *Washington,* 243 U. S. 219.

The procedure under our statute appears to comply with all the requirements of due process. A claim is presented to the State Industrial Board

and an opportunity is afforded for a hearing of all parties interested—the employee, the employer, the insurance carrier, and any and every witness whom the parties desire to call. The hearing is conducted much like a trial, with more liberality as to rules of evidence than is permitted in the ordinary case in court. When the decision is made, an appeal lies by either party to the Appellate Division. That court must determine whether or not on the review of the facts there be any evidence to sustain the award. The Industrial Board or the Commission can not make an award without evidence to support it, and this question is always open in the courts on appeal both to the Appellate Division and finally to this Court. Only where there is a conflict in evidence, or the reasonable inferences to be drawn from the evidence, is the decision of the board or commission of this conflict conclusive. This procedure meets all the requisites of due process as recently declared in *Dohany* v. *Rogers*, 281 U. S. 362, 369, where Mr. Justice Stone, writing for the court, said:

> The due process clause does not guarantee to the citizen of a state any particular form or method of state procedure. Under it he may neither claim a right to trial by jury nor a right of appeal. Its requirements are satisfied if he has reasonable notice and reasonable opportunity to be heard and to present his claim or defense, due regard being had to the nature of the proceeding and the character of the rights which may be affected by it. * * * Nor does the equal protection clause exact uniformity of procedure. The Legislature may classify litigation and adopt one type of procedure for one class and a different type for another.

Neither does the hearing before the Industrial Board lack the elements of due process, because the members of that board may be laymen and not lawyers duly admitted to practice within this state. Unlike our own State Constitution, there is nothing in the Federal Constitution or the acts of Congress, including the United States Judicial Code (U. S. Code, title 28, part 1, c. 1) which requires judges of courts, federal or state, to be lawyers or admitted to practice. The United States government, in seeking men for its judiciary or for its United States Attorneys General or district attorneys, can not be cramped in selection by the Legislatures of the States controlling admissions to the bar. There is no federal question, therefore, involved in the personnel of the State Industrial Board. Due process aims at fair dealing, adequate hearing, impartial decision, and the procedure to insure these, rather than with the personal equipment of the deciding body. Some things in government must be left to the sound discretion of the appointing power.

That the determination of commissioners appointed to condemn property for water supply may be conclusive as to value was determined in *Long Island Water-Supply Co.* v. *Brooklyn,* 166 U. S. 685, 695. "There is no denial of due process," said the court, "in making the findings of fact by the triers of fact, whether commissioners or a jury, final as to such facts, and leaving open to the courts simply the inquiry as to whether there was any erroneous basis adopted by the triers in their appraisal, or other errors in their proceedings."

As to the action of the Interstate Commerce Commission, the Supreme Court, in *Interstate Com-*

merce Commission v. *Union Pacific R. R. Co.*, 222 U. S. 541, 547, said:

> Its conclusion, of course, is subject to review, but, when supported by evidence, is accepted as final; not that its decision, involving, as it does, so many and such vast public interests, can be supported by a mere scintilla of proof—but the courts will not examine the facts further than to determine whether there was substantial evidence to sustain the order.

See, also, *Crane* v. *Hahlo*, 258 U. S. 142. This is the same duty which rests upon the appellate courts of our state in reviewing the determination of the Industrial Board in workmen's compensation cases. In point is *Wheeling Corrugating Co.* v. *McManigal* [C. C. A.], 41 F. (2d) 593.

The appellant claims that the case of *Ohio Valley Water Co.* v. *Ben Avon Borough*, 253 U. S. 287, has modified all this. Such is not the fact. The fixing of rates to be charged by a public service corporation is held by the federal court to be legislative in nature, and no action of a commission or a public regulating board can deprive the courts of the right and power to determine whether the rate is confiscatory. Such is the *Ben Avon case*, and nothing more. The State Legislature can not arbitrarily fix rates so low that a public utility corporation will not receive a fair return on its capital. Although hearings may be had before a legislative committee, yet they are so lacking in the elements of a judicial proceeding that the rate, when ultimately fixed, is nevertheless considered the fiat or act of the Legislature. The act or determination does not change its nature when passed on to another body created by the Legislature and termed a public service commission or utility board. It performs the same

work in fixing rates as does the Legislature. The rate directed or permitted to be charged and collected must be subject to review by the courts when claimed to be an illegal taking of property. This distinction has been reiterated in *Bluefield Water Works & Improvement Co.* v. *Public Service Commission of State of West Virginia*, 262 U. S. 679, 683, where it was stated:

> The prescribing of rates is a legislative act. The commission is an instrumentality of the state, exercising delegated powers. Its order is of the same force as would be a like enactment by the Legislature.

See, also, *Lehigh Valley R. R. Co.* v. *Board of Public Utility Commissioners*, 278 U. S. 24.

As a utility rate is generally fixed after an inquiry as to the facts by some legislative committee or public service commission, the *Ben Avon case* has awakened some comment. See Yale Law Journal, vol. XXX, pp. 681, 781; Harvard Law Review, vol. XXXIV, p. 862, and vol. XXXV, p. 139. But there is a great body of authority that the full force and effect of the due process clause can not be preserved if the rate-making power is removed from judicial investigation. So many are the complications in determining the question of fair return, that necessity, not theory, has moved the courts to this conclusion.

Whatever confusion, however, there may be in distinguishing legislative from judicial acts regarding rates does not arise in determining the status or injuries of a workman. Here the board or commission determines the events that have passed—the employment, the wages, the accident, the injury.

Such readily submit to oral proof, and the process of finding them is of a judicial nature. Such a board has the dignity and the form of many of our courts, the only distinction being that of name.

We conclude that the points raised by the appellant are without merit, and that our Workmen's Compensation Law does not violate any provision of the Federal Constitution. The Supreme Court of Illinois in *Nega* v. *Chicago Railways Co.*, 317 Ill. 482, arrived at the same conclusion.

Hawkins v. *Bleakly*, 243 U. S. 210, and *Booth Fisheries Co.* v. *Industrial Commission of Wisconsin*, 271 U. S. 208, dealt with compensation acts which were elective on the part of the employee.

The order should be affirmed, with costs.

CARDOZO, *Ch. J.*, POUND, LEHMAN, KELLOGG, O'BRIEN, and HUBBS, *J. J.*, concur.

Order affirmed.

U. S. GOVERNMENT PRINTING OFFICE: 1931

[PUBLIC—No. 803—69TH CONGRESS]

[S. 3170]

An Act To provide compensation for disability or death resulting from injury to employees in certain maritime employments, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SHORT TITLE

SECTION 1. This Act may be cited as "Longshoremen's and Harbor Workers' Compensation Act."

DEFINITIONS

SEC. 2. When used in this Act—

(1) The term "person" means individual, partnership, corporation, or association.

(2) The term "injury" means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury, and includes an injury caused by the willful act of a third person directed against an employee because of his employment.

(3) The term "employee" does not include a master or member of a crew of any vessel, nor any person engaged by the master to load or unload or repair any small vessel under eighteen tons net.

(4) The term "employer" means an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any dry dock.)

(5) The term "carrier" means any person or fund authorized under section 32 to insure under this Act and includes self-insurers.

(6) The term "commission" means the United States Employees' Compensation Commission.

(7) The term "deputy commissioner" means the deputy commissioner having jurisdiction in respect of an injury or death.

(8) The term "State" includes a Territory and the District of Columbia.

(9) The term "United States" when used in a geographical sense means the several States and Territories and the District of Columbia, including the territorial waters thereof.

(10) "Disability" means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment.

(11) "Death" as a basis for a right to compensation means only death resulting from an injury.

(12) "Compensation" means the money allowance payable to an employee or to his dependents as provided for in this Act, and includes funeral benefits provided therein.

(13) "Wages" means the money rate at which the service rendered is recompensed under the contract of hiring in force at the time of the injury, including the reasonable value of board, rent, housing, lodging, or similar advantage received from the employer, and gratuities received in the course of employment from others than the employer.

(14) "Child" shall include a posthumous child, a child legally adopted prior to the injury of the employee, and a stepchild or acknowledged illegitimate child dependent upon the deceased, but does not include married children unless wholly dependent on him. "Grandchild" means a child as above defined of a child as above defined. "Brother" and "sister" include stepbrothers and stepsisters, half brothers and half sisters, and brothers and sisters by adoption, but does not include married brothers nor married sisters unless wholly dependent on the employee. "Child," "grandchild," "brother," and "sister" include only persons who at the time of the death of the deceased employee are under eighteen years of age.

(15) The term "parent" includes step-parents and parents by adoption, parents-in-law, and any person who for more than three years prior to the death of the deceased employee stood in the place of a parent to him, if dependent on the injured employee.

(16) The term "widow" includes only the decedent's wife living with or dependent for support upon him at the time of his death; or living apart for justifiable cause or by reason of his desertion at such time.

(17) The term "widower" includes only the decedent's husband who at the time of her death lived with her and was dependent for support upon her.

(18) The terms "adoption" or "adopted" mean legal adoption prior to the time of the injury.

(19) The singular includes the plural and the masculine includes the feminine and neuter.

COVERAGE

SEC. 3. (a) Compensation shall be payable under this Act in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law. No compensation shall be payable in respect of the disability or death of—

(1) A master or member of a crew of any vessel, nor any person engaged by the master to load or unload or repair any small vessel under eighteen tons net; or

(2) An officer or employee of the United States or any agency thereof or of any State or foreign government, or of any political subdivision thereof.

(b) No compensation shall be payable if the injury was occasioned solely by the intoxication of the employee or by the willful intention of the employee to injure or kill himself or another.

LIABILITY FOR COMPENSATION

SEC. 4. (a) Every employer shall be liable for and shall secure the payment to his employees of the compensation payable under sections 7, 8, and 9. In the case of an employer who is a subcontractor, the contractor shall be liable for and shall secure the payment of such compensation to employees of the subcontractor unless the subcontractor has secured such payment.

(b) Compensation shall be payable irrespective of fault as a cause for the injury.

EXCLUSIVENESS OF LIABILITY

SEC. 5. The liability of an employer prescribed in section 4 shall be exclusive and in place of all other liability of such employer to the employee, his legal representative, husband or wife, parents, dependents, next of kin, and anyone otherwise entitled to recover damages from such employer at law or in admiralty on account of such injury or death, except that if an employer fails to secure payment of compensation as required by this Act, an injured employee, or his legal representative in case death results from the injury, may elect to claim compensation under this Act, or to maintain an action at law or in admiralty for damages on account of such injury or death. In such action the defendant may not plead as a defense that the injury was caused by the negligence of a fellow servant, nor that the employee assumed the risk of his employment, nor that the injury was due to the contributory negligence of the employee.

TIME FOR COMMENCEMENT OF COMPENSATION

SEC. 6. (a) No compensation shall be allowed for the first seven days of the disability, except the benefits provided for in section 7: *Provided, however*, That in case the injury results in disability of more than forty-nine days, the compensation shall be allowed from the date of the disability.

(b) Compensation for disability shall not exceed $25 per week nor be less than $8 per week: *Provided, however*, That if the employee's wages at the time of injury are less than $8 per week he shall receive his full weekly wages.

MEDICAL SERVICES AND SUPPLIES

SEC. 7. (a) The employer shall furnish such medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus for such period as the nature of the injury or the process of recovery may require. If the employer fails to provide the same, after request by the injured employee, such injured employee may do so at the expense of the employer. The employee shall not be entitled to recover any amount expended by him for such treatment or services unless he shall have requested the employer to furnish the same and the employer shall have refused or neglected to do so, or unless the nature of the injury required such treatment and services and the employer or his superintendent or foreman having knowledge of such injury shall have neglected to provide the same; nor shall any claim for medical or surgical treatment be valid

and enforceable, as against such employer, unless within twenty days following the first treatment the physician giving such treatment furnish to the employer and the deputy commissioner a report of such injury and treatment, on a form prescribed by the commission.

(b) Whenever in the opinion of the deputy commissioner a physician has not impartially estimated the degree of permanent disability or the extent of temporary disability of any injured employee, the deputy commissioner shall have the power to cause such employee to be examined by a physician selected by the deputy commissioner and to obtain from such physician a report containing his estimate of such disabilities. If the report of such physician shows that the estimate of the physician has not been impartial from the standpoint of such employee, the deputy commissioner shall have the power in his discretion to charge the cost of such examination to the employer, if he is a self-insurer, or to the insurance company which is carrying the risk.

(c) All fees and other charges for such treatment or service shall be limited to such charges as prevail in the same community for similar treatment of injured persons of like standard of living, and shall be subject to regulation by the deputy commissioner.

COMPENSATION FOR DISABILITY

SEC. 8. Compensation for disability shall be paid to the employee as follows:

(a) Permanent total disability: In case of total disability adjudged to be permanent 66⅔ per centum of the average weekly wages shall be paid to the employee during the continuance of such total disability. Loss of both hands, or both arms, or both feet, or both legs or both eyes, or of any two thereof shall, in the absence of conclusive proof to the contrary, constitute permanent total disability. In all other cases permanent total disability shall be determined in accordance with the facts.

(b) Temporary total disability: In case of disability total in character but temporary in quality 66⅔ per centum of the average weekly wages shall be paid to the employee during the continuance thereof.

(c) Permanent partial disability: In case of disability partial in character but permanent in quality the compensation shall be 66⅔ per centum of the average weekly wages, and shall be paid to the employee, as follows:

(1) Arm lost, three hundred and twelve weeks' compensation.
(2) Leg lost, two hundred and eighty-eight weeks' compensation.
(3) Hand lost, two hundred and forty-four weeks' compensation.
(4) Foot lost, two hundred and five weeks' compensation.
(5) Eye lost, one hundred and sixty weeks' compensation.
(6) Thumb lost, seventy-five weeks' compensation.
(7) First finger lost, forty-six weeks' compensation.
(8) Great toe lost, thirty-eight weeks' compensation.
(9) Second finger lost, thirty weeks' compensation.
(10) Third finger lost, twenty-five weeks' compensation.
(11) Toe other than great toe lost, sixteen weeks' compensation.
(12) Fourth finger lost, fifteen weeks' compensation.

(13) Loss of hearing: Compensation for loss of hearing of one ear, fifty-two weeks. Compensation for loss of hearing of both ears, two hundred weeks.

(14) Phalanges: Compensation for loss of more than one phalange of a digit shall be the same as for loss of the entire digit. Compensation for loss of the first phalange shall be one-half of the compensation for loss of the entire digit.

(15) Amputated arm or leg: Compensation for an arm or a leg, if amputated at or above the elbow or the knee, shall be the same as for a loss of the arm or leg; but, if amputated between the elbow and the wrist or the knee and the ankle, shall be the same as for loss of a hand or foot.

(16) Binocular vision or per centum of vision: Compensation for loss of binocular vision or for 80 per centum or more of the vision of an eye shall be the same as for loss of the eye.

(17) Two or more digits: Compensation for loss of two or more digits, or one or more phalanges of two or more digits, of a hand or foot may be proportioned to the loss of use of the hand or foot occasioned thereby, but shall not exceed the compensation for loss of a hand or foot.

(18) Total loss of use: Compensation for permanent total loss of use of a member shall be the same as for loss of the member.

(19) Partial loss or partial loss of use: Compensation for permanent partial loss or loss of use of a member may be for proportionate loss or loss of use of the member.

(20) Disfigurement: The deputy commissioner shall award proper and equitable compensation for serious facial or head disfigurement, not to exceed $3,500.

(21) Other cases: In all other cases in this class of disability the compensation shall be 66⅔ per centum of the difference between his average weekly wages and his wage-earning capacity thereafter in the same employment or otherwise, payable during the continuance of such partial disability, but subject to reconsideration of the degree of such impairment by the deputy commissioner on his own motion or upon application of any party in interest.

(22) In case of temporary total disability and permanent partial disability, both resulting from the same injury, if the temporary total disability continues for a longer period than the number of weeks set forth in the following schedule, the period of temporary total disability in excess of such number of weeks shall be added to the compensation period provided in subdivision (c) of this section: Arm, thirty-two weeks; leg, forty weeks; hand, thirty-two weeks; foot, thirty-two weeks; eye, twenty weeks; thumb, twenty-four weeks; first finger, eighteen weeks; great toe, twelve weeks, second finger, twelve weeks; third finger, eight weeks; fourth finger, eight weeks; toe other than great toe, eight weeks.

In any case resulting in loss or partial loss of use of arm, leg, hand, foot, eye, thumb, finger, or toe, where the temporary total disability does not extend beyond the periods above mentioned for such injury, compensation shall be limited to the schedule contained in subdivision (c).

(d) Any compensation to which any claimant would be entitled under subdivision (c) excepting subdivision (c–21) shall, notwith-

standing death arising from causes other than the injury, be payable to and for the benefit of the persons following:

(1) If there be a surviving wife or dependent husband and no child of the deceased under the age of eighteen years, to such wife or dependent husband.

(2) If there be a surviving wife or dependent husband and surviving child or children of the deceased under the age of eighteen years, one half shall be payable to the surviving wife or dependent husband and the other half to the surviving child or children.

(3) The deputy commissioner may in his discretion require the appointment of a guardian for the purpose of receiving the compensation of the minor child. In the absence of such a requirement the appointment for such a purpose shall not be necessary.

(4) If there be a surviving child or children of the deceased under the age of eighteen years, but no surviving wife or dependent husband, then to such child or children.

(5) An award for disability may be made after the death of the injured employee.

(e) Temporary partial disability: In case of temporary partial disability resulting in decrease of earning capacity the compensation shall be two-thirds of the difference between the injured employee's average weekly wages before the injury and his wage-earning capacity after the injury in the same or another employment, to be paid during the continuance of such disability, but shall not be paid for a period exceeding five years.

(f) Injury increasing disability: (1) If an employee receive an injury which of itself would only cause permanent partial disability but which, combined with a previous disability, does in fact cause permanent total disability, the employer shall provide compensation only for the disability caused by the subsequent injury: *Provided, however*, That in addition to compensation for such permanent partial disability, and after the cessation of the payments for the prescribed period of weeks, the employee shall be paid the remainder of the compensation that would be due for permanent total disability. Such additional compensation shall be paid out of the special fund established in section 44.

(2) In all other cases in which, following a previous disability, an employee receives an injury which is not covered by (1) of this subdivision, the employer shall provide compensation only for the disability caused by the subsequent injury. In determining compensation for the subsequent injury or for death resulting therefrom, the average weekly wages shall be such sum as will reasonably represent the earning capacity of the employee at the time of the subsequent injury.

(g) Maintenance for employees undergoing vocational rehabilitation: An employee who as a result of injury is or may be expected to be totally or partially incapacitated for a remunerative occupation and who, under the direction of the commission as provided by section 39 (c) of this Act, is being rendered fit to engage in a remunerative occupation, shall receive additional compensation necessary for his maintenance, but such additional compensation shall not exceed $10 a week. The expense shall be paid out of the special fund established in section 44.

COMPENSATION FOR DEATH

SEC. 9. If the injury causes death, the compensation shall be known as a death benefit and shall be payable in the amount and to or for the benefit of the persons following:

(a) Reasonable funeral expenses not exceeding $200.

(b) If there be a surviving wife or dependent husband and no child of the deceased under the age of eighteen years, to such wife or dependent husband 35 per centum of the average wages of the deceased, during widowhood, or dependent widowerhood with two years' compensation in one sum upon remarriage; and if there be a surviving child or children of the deceased under the age of eighteen years, the additional amount of 10 per centum of such wages for each such child until the age of eighteen years; in case of the death or remarriage of such surviving wife or dependent husband any surviving child of the deceased employee, at the time under eighteen years of age, shall have his compensation increased to 15 per centum of such wage, and the same shall be payable until he shall reach the age of eighteen years: *Provided*, That the total amount payable shall in no case exceed 66⅔ per centum of such wages. The deputy commissioner having jurisdiction over the claim may, in his discretion, require the appointment of a guardian for the purpose of receiving the compensation of a minor child. In the absence of such a requirement the appointment of a guardian for such purposes shall not be necessary.

(c) If there be a surviving child or children of the deceased under the age of eighteen years, but no surviving wife or dependent husband, then for the support of each such child under the age of eighteen years, 15 per centum of the wages of the deceased: *Provided*, That the aggregate shall in no case exceed 66⅔ per centum of such wages.

(d) If there be no surviving wife or dependent husband or child under the age of eighteen years or if the amount payable to a surviving wife or dependent husband and to children under the age of eighteen years shall be less in the aggregate than 66⅔ per centum of the average wages of the deceased; then for the support of grandchildren or brothers and sisters under the age of eighteen years, if dependent upon the deceased at the time of the injury, 15 per centum of such wages for the support of each such person until the age of eighteen years and for the support of each parent, or grandparent, of the deceased if dependent upon him at the time of the injury, 25 per centum of such wages during such dependency. But in no case shall the aggregate amount payable under this subdivision exceed the difference between 66⅔ per centum of such wages, and the amount payable as hereinbefore provided to surviving wife or dependent husband and for the support of surviving child or children.

(e) In computing death benefits the average weekly wages of the deceased shall be considered to have been not more than $37.50 nor less than $12, but the total weekly compensation shall not exceed the weekly wages of the deceased.

(f) All questions of dependency shall be determined as of the time of the injury.

(g) Aliens: Compensation under this chapter to aliens not residents (or about to become nonresidents) of the United States or Canada shall be the same in amount as provided for residents, except that dependents in any foreign country shall be limited to surviving wife and child or children, or if there be no surviving wife or child or children, to surviving father or mother whom the employee has supported, either wholly or in part, for the period of one year prior to the date of the injury, and except that the commission may, at its option or upon the application of the insurance carrier shall, commute all future installments of compensation to be paid to such aliens by paying or causing to be paid to them one-half of the commuted amount of such future installments of compensation as determined by the commission.

DETERMINATION OF PAY

SEC. 10. Except as otherwise provided in this Act, the average weekly wage of the injured employee at the time of the injury shall be taken as the basis upon which to compute compensation and shall be determined as follows:

(a) If the injured employee shall have worked in the employment in which he was working at the time of the injury, whether for the same or another employer, during substantially the whole of the year immediately preceding his injury, his average annual earnings shall consist of three hundred times the average daily wage or salary which he shall have earned in such employment during the days when so employed.

(b) If the injured employee shall not have worked in such employment during substantially the whole of such year, his average annual earnings shall consist of three hundred times the average daily wage or salary which an employee of the same class working substantially the whole of such immediately preceding year in the same or in similar employment in the same or a neighboring place shall have earned in such employment during the days when so employed.

(c) If either of the foregoing methods of arriving at the annual average earnings of an injured employee can not reasonably and fairly be applied, such annual earnings shall be such sum as, having regard to the previous earnings of the injured employee and of other employees of the same or most similar class, working in the same or most similar employment in the same or neighboring locality, shall reasonably represent the annual earning capacity of the injured employee in the employment in which he was working at the time of the injury.

(d) The average weekly wages of an employee shall be one fifty-second part of his average annual earnings.

(e) If it be established that the injured employee was a minor when injured, and that under normal conditions his wages should be expected to increase during the period of disability the fact may be considered in arriving at his average weekly wages.

GUARDIAN FOR MINOR OR INCOMPETENT

SEC. 11. The deputy commissioner may require the appointment by a court of competent jurisdiction, for any person who is mentally

incompetent or a minor, of a guardian or other representative to receive compensation payable to such person under this Act and to exercise the powers granted to or to perform the duties required of such person under this Act.

NOTICE OF INJURY OR DEATH

SEC. 12. (a) Notice of an injury or death in respect of which compensation is payable under this Act shall be given within thirty days after the date of such injury or death (1) to the deputy commissioner in the compensation district in which such injury occurred and (2) to the employer.

(b) Such notice shall be in writing, shall contain the name and address of the employee and a statement of the time, place, nature, and cause of the injury or death, and shall be signed by the employee or by some person on his behalf, or in case of death, by any person claiming to be entitled to compensation for such death or by a person on his behalf.

(c) Notice shall be given to the deputy commissioner by delivering it to him or sending it by mail addressed to his office, and to the employer by delivering it to him or by sending it by mail addressed to him at his last known place of business. If the employer is a partnership, such notice may be given to any partner, or if a corporation, such notice may be given to any agent or officer thereof upon whom legal process may be served or who is in charge of the business in the place where the injury occurred.

(d) Failure to give such notice shall not bar any claim under this Act (1) if the employer (or his agent in charge of the business in the place where the injury occurred) or the carrier had knowledge of the injury or death and the deputy commissioner determines that the employer or carrier has not been prejudiced by failure to give such notice, or (2) if the deputy commissioner excuses such failure on the ground that for some satisfactory reason such notice could not be given; nor unless objection to such failure is raised before the deputy commissioner at the first hearing of a claim for compensation in respect of such injury or death.

TIME FOR FILING OF CLAIMS

SEC. 13. (a) The right to compensation for disability under this Act shall be barred unless a claim therefor is filed within one year after the injury, and the right to compensation for death shall be barred unless a claim therefor is filed within one year after the death, except that if payment of compensation has been made without an award on account of such injury or death a claim may be filed within one year after the date of the last payment. Such claim shall be filed with the deputy commissioner in the compensation district in which such injury or such death occurred.

(b) Notwithstanding the provisions of subdivision (a) failure to file a claim within the period prescribed in such subdivision shall not be a bar to such right unless objection to such failure is made at the first hearing of such claim in which all parties in interest are given reasonable notice and opportunity to be heard.

(c) If a person who is entitled to compensation under this Act is mentally incompetent of a minor, the provisions of subdivision (a) shall not be applicable so long as such person has no guardian or other authorized representative, but shall be applicable in the case of a person who is mentally incompetent or a minor from the date of appointment of such guardian or other representative, or in the case of a minor, if no guardian is appointed before he becomes of age, from the date he becomes of age.

(d) Where recovery is denied to any person, in a suit brought at law or in admiralty to recover damages in respect of injury or death, on the ground that such person was an employee and that the defendant was an employer within the meaning of this Act and that such employer had secured compensation to such employee under this Act, the limitation of time prescribed in subdivision (a) shall begin to run only from the date of termination of such suit.

PAYMENT OF COMPENSATION

SEC. 14. (a) Compensation under this Act shall be paid periodically, promptly, and directly to the person entitled thereto, without an award, except where liability to pay compensation is controverted by the employer.

(b) The first installment of compensation shall become due on the fourteenth day after the employer has knowledge of the injury or death, on which date all compensation then due shall be paid. Thereafter compensation shall be paid in installments, semimonthly, except where the deputy commissioner determines that payment in installments should be made monthly or at some other period.

(c) Upon making the first payment, and upon suspension of payment for any cause, the employer shall immediately notify the deputy commissioner, in accordance with a form prescribed by the commission, that payment of compensation has begun or has been suspended, as the case may be.

(d) If the employer controverts the right to compensation he shall file with the deputy commissioner on or before the fourteenth day after he has knowledge of the alleged injury or death, a notice, in accordance with a form prescribed by the commission, stating that the right to compensation is controverted, the name of the claimant, the name of the employer, the date of the alleged injury or death, and the grounds upon which the right to compensation is controverted.

(e) If any installment of compensation payable without an award is not paid within fourteen days after it becomes due, as provided in subdivision (b) of this section, there shall be added to such unpaid installment an amount equal to 10 per centum thereof, which shall be paid at the same time as, but in addition to, such installment, unless notice is filed under subdivision (d) of this section, or unless such nonpayment is excused by the deputy commissioner after a showing by the employer that owing to conditions over which he had no control such installment could not be paid within the period prescribed for the payment.

(f) If any compensation, payable under the terms of an award, is not paid within ten days after it becomes due, there shall be added to such unpaid compensation an amount equal to 20 per centum thereof, which shall be paid at the same time as but in addition to

such compensation, unless review of the compensation order making such award is had as provided in section 21.

(g) Within sixteen days after final payment of compensation has been made, the employer shall send to the deputy commissioner a notice, in accordance with a form prescribed by the commission, stating that such final payment has been made, the total amount of compensation paid, the name of the employee and of any other person to whom compensation has been paid, the date of the injury or death, and the date to which compensation has been paid. If the employer fails to so notify the deputy commissioner within such time the commission shall assess against such employer a civil penalty in the amount of $100.

(h) The deputy commissioner (1) may upon his own initiative at any time in a case in which payments are being made without an award, and (2) shall in any case where right to compensation is controverted, or where payments of compensation have been stopped or suspended, upon receipt of notice from any person entitled to compensation, or from the employer, that the right to compensation is controverted, or that payments of compensation have been stopped or suspended, make such investigations, cause such medical examinations to be made, or hold such hearings, and take such further action as he considers will properly protect the rights of all parties.

(i) Whenever the deputy commissioner deems it advisable he may require any employer to make a deposit with the Treasurer of the United States to secure the prompt and convenient payment of such compensation, and payments therefrom upon any awards shall be made upon order of the deputy commissioner.

(j) Whenever the deputy commissioner determines that it is for the best interests of a person entitled to compensation, the liability of the employer for such compensation may be discharged by the payment of a lump sum equal to the present value of all future payments of compensation computed at 4 per centum true discount compounded annually. The probability of the death of the injured employee or other person entitled to compensation before the expiration of the period during which he is entitled to compensation shall be determined in accordance with the American Experience Table of Mortality. The probability of the happening of any other contingency affecting the amount or duration of the compensation shall be disregarded.

(k) If the employer has made advance payments of compensation, he shall be entitled to be reimbursed out of any unpaid installment or installments of compensation due.

(l) An injured employee, or in case of death his dependents or personal representative, shall give receipts for payment of compensation to the employer paying the same and such employer shall produce the same for inspection by the deputy commissioner, whenever required.

(m) The total compensation payable under this Act for injury or death shall in no event exceed the sum of $7,500.

INVALID AGREEMENTS

SEC. 15. (a) No agreement by an employee to pay any portion of premium paid by his employer to a carrier or to contribute to a

benefit fund or department maintained by such employer for the purpose of providing compensation or medical services and supplies as required by this Act shall be valid, and any employer who makes a deduction for such purpose from the pay of any employee entitled to the benefits of this Act shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not more than $1,000.

(b) No agreement by an employee to waive his right to compensation under this Act shall be valid.

ASSIGNMENT AND EXEMPTION FROM CLAIMS OF CREDITORS

SEC. 16. No assignment, release, or commutation of compensation or benefits due or payable under this Act, except as provided by this Act, shall be valid, and such compensation and benefits shall be exempt from all claims of creditors and from levy, execution, and attachment or other remedy for recovery or collection of a debt, which exemption may not be waived.

COMPENSATION A LIEN AGAINST ASSETS

SEC. 17. Compensation shall have the same preference of lien against the assets of the carrier or employer without limit of amount as is now or may hereafter be allowed by law to the claimant for unpaid wages or otherwise.

COLLECTION OF DEFAULTED PAYMENTS

SEC. 18. In case of default by the employer in the payment of compensation due under any award of compensation for a period of thirty days after the compensation is due and payable, the person to whom such compensation is payable may, within one year after such default, make application to the deputy commissioner making the compensation order or a supplementary order declaring the amount of the default. After investigation, notice, and hearing, as provided in section 19, the deputy commissioner shall make a supplementary order, declaring the amount of the default, which shall be filed in the same manner as the compensation order. In case the payment in default is an installment of the award, the deputy commissioner may, in his discretion, declare the whole of the award as the amount in default. The applicant may file a certified copy of such supplementary order with the clerk of the Federal district court for the judicial district in which the employer has his principal place of business or maintains an office, or for the judicial district in which the injury occurred. In case such principal place of business or office or place where the injury occurred is in the District of Columbia, a copy of such supplementary order may be filed with the clerk of the Supreme Court of the District of Columbia. Such supplementary order of the deputy commissioner shall be final, and the court shall upon the filing of the copy enter judgment for the amount declared in default by the supplementary order if such supplementary order is in accordance with law. Review of the judgment so entered may be had as in civil suits for damages at common law. Final proceedings to execute the judgment may be had by writ of execution in the form used by the court in suits at common law in actions of

assumpsit. No fee shall be required for filing the supplementary order nor for entry of judgment thereon, and the applicant shall not be liable for costs in a proceeding for review of the judgment unless the court shall otherwise direct. The court shall modify such judgment to conform to any later compensation order upon presentation of a certified copy thereof to the court.

PROCEDURE IN RESPECT OF CLAIMS

SEC. 19. (a) Subject to the provisions of section 13 a claim for compensation may be filed with the deputy commissioner in accordance with regulations prescribed by the commission at any time after the first seven days of disability following any injury, or at any time after death, and the deputy commissioner shall have full power and authority to hear and determine all questions in respect of such claim.

(b) Within ten days after such claim is filed the deputy commissioner, in accordance with regulations prescribed by the commission, shall notify the employer and any other person (other than the claimant), whom the deputy commissioner considers an interested party, that a claim has been filed. Such notice may be served personally upon the employer or other person, or sent to such employer or person by registered mail.

(c) The deputy commissioner shall make or cause to be made such investigations as he considers necessary in respect of the claim, and upon application of any interested party shall order a hearing thereon. If a hearing on such claim is ordered the deputy commissioner shall give the claimant and other interested parties at least ten days' notice of such hearing, served personally upon the claimant and other interested parties or sent to such claimant and other interested parties by registered mail, and shall within twenty days after such hearing is had, by order, reject the claim or make an award in respect of the claim. If no hearing is ordered within twenty days after notice is given as provided in subdivision (b), the deputy commissioner shall, by order, reject the claim or make an award in respect of the claim.

(d) At such hearing the claimant and the employer may each present evidence in respect of such claim and may be represented by any person authorized in writing for such purpose.

(e) The order rejecting the claim or making the award (referred to in this Act as a compensation order) shall be filed in the office of the deputy commissioner, and a copy thereof shall be sent by registered mail to the claimant and to the employer at the last known address of each.

(f) An award of compensation for disability may be made after the death of an injured employee.

(g) After a compensation order has issued in any case the deputy commissioner may transfer such case to any other deputy commissioner for the purpose of taking testimony or making physical examinations.

(h) An injured employee claiming or entitled to compensation shall submit to such physical examination by a medical officer of the United States or by a duly qualified physician designated or approved by the commission as the deputy commissioner may require.

The place or places shall be reasonably convenient for the employee. Such physician or physicians as the employee, employer, or carrier may select and pay for may participate in an examination if the employee, employer, or carrier so requests. Proceedings shall be suspended and no compensation be payable for any period during which the employee may refuse to submit to examination.

PRESUMPTIONS

SEC. 20. In any proceeding for the enforcement of a claim for compensation under this Act it shall be presumed, in the absence of substantial evidence to the contrary—

(a) That the claim comes within the provisions of this Act.

(b) That sufficient notice of such claim has been given.

(c) That the injury was not occasioned solely by the intoxication of the injured employee.

(d) That the injury was not occasioned by the willful intention of the injured employee to injure or kill himself or another.

REVIEW OF COMPENSATION ORDERS

SEC. 21. (a) A compensation order shall become effective when filed in the office of the deputy commissioner as provided in section 19, and, unless proceedings for the suspension or setting aside of such order are instituted as provided in subdivision (b) of this section, shall become final at the expiration of the thirtieth day thereafter.

(b) If not in accordance with law, a compensation order may be suspended or set aside, in whole or in part, through injunction proceedings, mandatory or otherwise, brought by any party in interest against the deputy commissioner making the order, and instituted in the Federal district court for the judicial district in which the injury occurred (or in the Supreme Court of the District of Columbia if the injury occurred in the District). The orders, writs, and processes of the court in such proceedings may run, be served, and be returnable anywhere in the United States. The payment of the amounts required by an award shall not be stayed pending final decision in any such proceeding unless upon application for an interlocutory injunction the court, on hearing, after not less than three days' notice to the parties in interest and the deputy commissioner, allows the stay of such payments, in whole or in part, where irreparable damage would otherwise ensue to the employer. The order of the court allowing any such stay shall contain a specific finding, based upon evidence submitted to the court and identified by reference thereto, that such irreparable damage would result to the employer, and specifying the nature of the damage.

(c) If any employer or his officers or agents fails to comply with a compensation order making an award, that has become final, any beneficiary of such award or the deputy commissioner making the order, may apply for the enforcement of the order to the Federal district court for the judicial district in which the injury occurred (or to the Supreme Court of the District of Columbia if the injury occurred in the District). If the court determines that the order was made and served in accordance with law, and that such employer

or his officers or agents have failed to comply therewith, the court shall enforce obedience to the order by writ of injunction or by other proper process, mandatory or otherwise, to enjoin upon such person and his officers and agents compliance with the order.

(d) Proceedings for suspending, setting aside, or enforcing a compensation order, whether rejecting a claim or making an award, shall not be instituted otherwise than as provided in this section and section 18.

MODIFICATION OF AWARDS

SEC. 22. Upon his own initiative, or upon application of any party in interest, on the ground of a change in conditions, the deputy commissioner may at any time during the term of an award and after the compensation order in respect of such award has become final, review such order in accordance with the procedure prescribed in respect of claims in section 19, and in accordance with such section issue a new compensation order which may terminate, continue, increase, or decrease such compensation. Such new order shall not affect any compensation paid under authority of the prior order.

PROCEDURE BEFORE THE DEPUTY COMMISSIONER

SEC. 23. (a) In making an investigation or inquiry or conducting a hearing the deputy commissioner shall not be bound by common law or statutory rules of evidence or by technical or formal rules of procedure, except as provided by this Act; but may make such investigation or inquiry or conduct such hearing in such manner as to best ascertain the rights of the parties. Declarations of a deceased employee concerning the injury in respect of which the investigation or inquiry is being made or the hearing conducted shall be received in evidence and shall, if corroborated by other evidence, be sufficient to establish the injury.

(b) Hearings before a deputy commissioner shall be open to the public and shall be stenographically reported, and the deputy commissioners, subject to the approval of the commission, are authorized to contract for the reporting of such hearings. The commission shall by regulation provide for the preparation of a record of the hearings and other proceedings before the deputy commissioners.

WITNESSES

SEC. 24. No person shall be required to attend as a witness in any proceeding before a deputy commissioner at a place outside of the State of his residence and more than one hundred miles from his place of residence, unless his lawful mileage and fee for one day's attendance shall be first paid or tendered to him; but the testimony of any witness may be taken by deposition or interrogatories according to the rules of practice of the Federal district court for the judicial district in which the case is pending (or of the Supreme Court of the District of Columbia if the case is pending in the District).

WITNESS FEES

SEC. 25. Witnesses summoned in a proceeding before a deputy commissioner or whose depositions are taken shall receive the same fees and mileage as witnesses in courts of the United States.

COSTS IN PROCEEDINGS BROUGHT WITHOUT REASONABLE GROUNDS

SEC. 26. If the court having jurisdiction of proceedings in respect of any claim or compensation order determines that the proceedings in respect of such claim or order have been instituted or continued without reasonable ground, the costs of such proceedings shall be assessed against the party who has so instituted or continued such proceedings.

POWERS OF DEPUTY COMMISSIONERS

SEC. 27. (a) The deputy commissioner shall have power to preserve and enforce order during any such proceedings; to issue subpœnas for, to administer oaths to, and to compel the attendance and testimony of witnesses, or the production of books, papers, documents, and other evidence, or the taking of depositions before any designated individual competent to administer oaths; to examine witnesses; and to do all things conformable to law which may be necessary to enable him effectively to discharge the duties of his office.

(b) If any person in proceedings before a deputy commissioner disobeys or resists any lawful order or process, or misbehaves during a hearing or so near the place thereof as to obstruct the same, or neglects to produce, after having been ordered to do so, any pertinent book, paper, or document, or refuses to appear after having been subpœnaed, or upon appearing refuses to take the oath as a witness, or after having taken the oath refuses to be examined according to law, the deputy commissioner shall certify the facts to the district court having jurisdiction in the place in which he is sitting (or to the Supreme Court of the District of Columbia if he is sitting in such District) which shall thereupon in a summary manner hear the evidence as to the acts complained of, and, if the evidence so warrants, punish such person in the same manner and to the same extent as for a contempt committed before the court, or commit such person upon the same conditions as if the doing of the forbidden act had occurred with reference to the process of or in the presence of the court.

FEES FOR SERVICES

SEC. 28. (a) No claim for legal services or for any other services rendered in respect of a claim or award for compensation, to or on account of any person, shall be valid unless approved by the deputy commissioner, or if proceedings for review of the order of the deputy commissioner in respect of such claim or award are had before any court, unless approved by such court. Any claim so approved shall, in the manner and to the extent fixed by the deputy commissioner or such court, be a lien upon such compensation.

(b) Any person (1) who receives any fee, other consideration, or any gratuity on account of services so rendered, unless such consideration or gratuity is approved by the deputy commissioner or such court, or (2) who makes it a business to solicit employment for a lawyer or for himself in respect of any claim or award for compensation, shall be guilty of a misdemeanor, and upon conviction thereof, shall, for each offense, be punished by a fine of not more than $1,000 or by imprisonment not to exceed one year, or by both such fine and imprisonment.

RECORD OF INJURY OR DEATH

SEC. 29. Every employer shall keep a record in respect of any injury to an employee. Such record shall contain such information of disease, other disability, or death in respect of such injury as the commission may by regulation require, and shall be available to inspection by the commission or by any State authority at such times and under such conditions as the commission may by regulation prescribe.

REPORTS

SEC. 30. (a) Within ten days from the date of any injury or death or from the date that the employer has knowledge of a disease or infection in respect of such injury, the employer shall send to the commission a report setting forth (1) the name, address, and business of the employer; (2) the name, address, and occupation of the employee; (3) the cause and nature of the injury or death; (4) the year, month, day, and hour when and the particular locality where the injury or death occurred; and (5) such other information as the commission may require. A copy of such report shall be sent at the same time to the deputy commissioner in the compensation district in which the injury occurred.

(b) Additional reports in respect of such injury and of the condition of such employee shall be sent by the employer to the commission and to such deputy commissioner at such times and in such manner as the commission may prescribe.

(c) Any report provided for in subdivision (a) or (b) shall not be evidence of any fact stated in such report in any proceeding in respect of such injury or death on account of which the report is made.

(d) The mailing of any such report and copy in a stamped envelope, within the time prescribed in subdivisions (a) or (b), to the commission and deputy commissioner, respectively, shall be a compliance with this section.

(e) Any employer who fails or refuses to send any report required of him by this section shall be subject to a civil penalty not to exceed $500 for each such failure or refusal.

PENALTY FOR MISREPRESENTATION

SEC. 31. Any person who willfully makes any false or misleading statement or representation for the purpose of obtaining any benefit or payment under this Act shall be guilty of a misdemeanor and on conviction thereof shall be punished by a fine of not to exceed $1,000 or by imprisonment of not to exceed one year, or by both such fine and imprisonment.

SECURITY FOR COMPENSATION

SEC. 32. (a) Every employer shall secure the payment of compensation under this Act—

(1) By insuring and keeping insured the payment of such compensation with any stock company or mutual company or association,

or with any other person or fund, while such person or fund is authorized (A) under the laws of the United States or of any State, to insure workmen's compensation, and (B) by the commission, to insure payment of compensation under this Act; or

(2) By furnishing satisfactory proof to the commission of his financial ability to pay such compensation and receiving an authorization from the commission to pay such compensation directly. The commission may, as a condition to such authorization, require such employer to deposit in a depository designated by the commission either an indemnity bond or securities (at the option of the employer) of a kind and in an amount determined by the commission, and subject to such conditions as the commission may prescribe, which shall include authorization to the commission in case of default to sell any such securities sufficient to pay compensation awards or to bring suit upon such bonds, to procure prompt payment of compensation under this Act. Any employer securing compensation in accordance with the provisions of this paragraph shall be known as a self-insurer.

(b) In granting authorization to any carrier to insure payment of compensation under this Act the commission may take into consideration the recommendation of any State authority having supervision over carriers or over workmen's compensation, and may authorize any carrier to insure the payment of compensation under this Act in a limited territory. Any marine protection and indemnity mutual insurance corporation or association, authorized to write insurance against liability for loss or damage from personal injury and death, and for other losses and damages, incidental to or in respect of the ownership, operation, or chartering of vessels on a mutual assessment plan, shall be deemed a qualified carrier to insure compensation under this Act. The commission may suspend or revoke any such authorization for good cause shown after a hearing at which the carrier shall be entitled to be heard in person or by counsel and to present evidence. No suspension or revocation shall affect the liability of any carrier already incurred.

COMPENSATION FOR INJURIES WHERE THIRD PERSONS ARE LIABLE

SEC. 33. (a) If on account of a disability or death for which compensation is payable under this Act the person entitled to such compensation determines that some person other than the employer is liable in damages, he may elect, by giving notice to the deputy commissioner in such manner as the commission may provide, to receive such compensation or to recover damages against such third person.

(b) Acceptance of such compensation shall operate as an assignment to the employer of all right of the person entitled to compensation to recover damages against such third person, whether or not the person entitled to compensation has notified the deputy commissioner of his election.

(c) The payment of such compensation into the fund established in section 44 shall operate as an assignment to the employer of all right of the legal representative of the deceased (hereinafter referred to as "representative") to recover damages against such third

person, whether or not the representative has notified the deputy commissioner of his election.

(d) Such employer on account of such assignment may either institute proceedings for the recovery of such damages or may compromise with such third person either without or after instituting such proceeding.

(e) Any amount recovered by such employer on account of such assignment, whether or not as the result of a compromise, shall be distributed as follows:

(1) The employer shall retain an amount equal to—

(A) The expenses incurred by him in respect of such proceedings or compromise (including a reasonable attorney's fee as determined by the deputy commissioner).

(B) The cost of all benefits actually furnished by him to the employee under section 7.

(C) All amounts paid as compensation, and the present value of all amounts payable as compensation, such present value to be computed in accordance with a schedule prepared by the commission, and the amounts so computed to be retained by the employer as a trust fund to pay such compensation as it becomes due and to pay any sum, in excess of such compensation, to the person entitled to compensation or to the representative; and

(2) The employer shall pay any excess to the person entitled to compensation or to the representative.

(f) If the person entitled to compensation or the representative elects to recover damages against such third person and notifies the commission of his election and institutes proceedings within the period prescribed in section 13, the employer shall be required to pay as compensation under this Act a sum equal to the excess of the amount which the commission determines is payable on account of such injury or death over the amount recovered against such third person.

(g) If a compromise with such third person is made by the person entitled to compensation or such representative of an amount less than the compensation to which such person or representative would be entitled to under this Act, the employer shall be liable for compensation as determined in subdivision (e) only if such compromise is made with his written approval.

(h) The deputy commissioner may, if the person entitled to compensation under this Act is a minor, make any election required under subdivision (a) of this section, or may authorize the parent or guardian of the minor to make such election.

COMPENSATION NOTICE

SEC. 34. Every employer who has secured compensation under the provisions of this Act shall keep posted in a conspicuous place or places in and about his place or places of business typewritten or printed notices, in accordance with a form prescribed by the commission, stating that such employer has secured the payment of compensation in accordance with the provisions of this Act. Such notices shall contain the name and address of the carrier, if any, with whom the employer has secured payment of compensation and the date of the expiration of the policy.

SUBSTITUTION OF CARRIER FOR EMPLOYER

SEC. 35. In any case where the employer is not a self-insurer, in order that the liability for compensation imposed by this Act may be most effectively discharged by the employer, and in order that the administration of this Act in respect of such liability may be facilitated, the commission shall by regulation provide for the discharge, by the carrier for such employer, of such obligations and duties of the employer in respect of such liability, imposed by this Act upon the employer, as it considers proper in order to effectuate the provisions of this Act. For such purposes (1) notice to or knowledge of an employer of the occurrence of the injury shall be notice to or knowledge of the carrier, (2) jurisdiction of the employer by a deputy commissioner, the commission, or any court under this Act shall be jurisdiction of the carrier, and (3) any requirement by a deputy commissioner, the commission, or any court under any compensation order, finding, or decision shall be binding upon the carrier in the same manner and to the same extent as upon the employer.

INSURANCE POLICIES

SEC. 36. (a) Every policy or contract of insurance issued under authority of this Act shall contain (1) a provision to carry out the provisions of section 35, and (2) a provision that insolvency or bankruptcy of the employer and/or discharge therein shall not relieve the carrier from payment of compensation for disability or death sustained by an employee during the life of such policy or contract.

(b) No contract or policy of insurance issued by a carrier under this Act shall be canceled prior to the date specified in such contract or policy for its expiration until at least thirty days have elapsed after a notice of cancellation has been sent to the deputy commissioner and to the employer in accordance with the provisions of subdivision (c) of section 12.

CERTIFICATE OF COMPLIANCE WITH THIS ACT

SEC. 37. No stevedoring firm shall be employed in any compensation district by a vessel or by hull owners until it presents to such vessel or hull owners a certificate issued by a deputy commissioner assigned to such district that it has complied with the provisions of this Act requiring the securing of compensation to its employees. Any person violating the provisions of this section shall be punished by a fine of not more than $1,000, or by imprisonment for not more than one year, or by both such fine and imprisonment.

PENALTY FOR FAILURE TO SECURE PAYMENT OF COMPENSATION

SEC. 38. Any employer required to secure the payment of compensation under this act who fails to secure such compensation shall be guilty of a misdemeanor and, upon conviction thereof, shall be punished by a fine of not more than $1,000, or by imprisonment for not more than one year, or by both such fine and imprisonment.

This section shall not affect any other liability of the employer under this Act.

ADMINISTRATION

SEC. 39. (a) Except as otherwise specifically provided, the United States Employees' Compensation Commission shall administer the provisions of this Act, and for such purpose the commission is authorized (1) to make such rules and regulations; (2) to appoint and fix the compensation of such temporary technical assistants and medical advisers, and, subject to the provisions of the civil service laws, to appoint, and, in accordance with the Classification Act of 1923, to fix the compensation of such deputy commissioners (except deputy commissioners appointed under subdivision (a) of section 40) and other officers and employees; and (3) to make such expenditures (including expenditures for personal services and rent at the seat of government and elsewhere, for law books, books of reference, periodicals, and for printing and binding) as may be necessary in the administration of this Act. All expenditures of the commission in the administration of this Act shall be allowed and paid as provided in section 45 upon the presentation of itemized vouchers therefor approved by the commission.

(b) The commission shall establish compensation districts, to include the high seas and the areas within the United States to which this Act applies, and shall assign to each such district one or more deputy commissioners, as the commission deems advisable. Judicial proceedings under sections 18 and 21 of this Act in respect of any injury or death occurring on the high seas shall be instituted in the district court within whose territorial jurisdiction is located the office of the deputy commissioner having jurisdiction in respect of such injury or death (or in the Supreme Court of the District of Columbia if such office is located in such District).

(c) The commission shall direct the vocational rehabilitation of permanently disabled employees and shall arrange with the appropriate public or private agencies in States or Territories, possessions, or the District of Columbia for such education. The Federal Board for Vocational Education shall cooperate with the commission in such educational work. The commission may in its discretion furnish such prosthetic appliances or other apparatus made necessary by an injury upon which an award has been made under this Act to render a disabled employee fit to engage in a remunerative occupation. If any surplus is left in any fiscal year in the fund provided for in section 44, such surplus may be used in subsequent fiscal years for the purposes of this section except for the purposes of administration and investigation.

DEPUTY COMMISSIONERS

SEC. 40. (a) The commission may appoint as deputy commissioners any member of any board, commission, or other agency of a State to act as deputy commissioner for any compensation district or part thereof in such State, and may make arrangements with such board, commission, or other agency for the use of the personnel and facilities thereof in the administration of this Act. The

commission may make such arrangements as may be deemed advisable by it for the payment of expenses of such board, commission, or other agency, incurred in the administration of this Act pursuant to this section, and for the payment of salaries to such board, commission, or other agency, or the members thereof, and may pay any amounts agreed upon to the proper officers of the State, upon vouchers approved by the commission.

(b) In any Territory of the United States or in the District of Columbia a person holding an office under the United States may be appointed deputy commissioner and for services rendered as deputy commissioner may be paid compensation, in addition to that he is receiving from the United States, in an amount fixed by the commission in accordance with the Classification Act of 1923.

(c) Deputy commissioners (except deputy commissioners appointed under subdivision (a) of this section) may be transferred from one compensation district to another and may be temporarily detailed from one compensation district for service in another in the discretion of the commission.

(d) Each deputy commissioner shall maintain and keep open during reasonable business hours an office, at a place designated by the commission, for the transaction of business under this Act, at which office he shall keep his official records and papers. Such office shall be furnished and equipped by the commission, who shall also furnish the deputy commissioner with all necessary clerical and other assistants, records, books, blanks, and supplies. Wherever practicable such office shall be located in a building owned or leased by the United States; otherwise the commission shall rent suitable quarters.

(e) If any deputy commissioner is removed from office, or for any reason ceases to act as such deputy commissioner, all of his official records and papers and office equipment shall be transferred to his successor in office or, if there be no successor, then to the commission or to a deputy commissioner designated by the commission.

(f) Neither a deputy commissioner nor any business associate of a deputy commissioner shall appear as attorney in any proceeding under this Act, and no deputy commissioner shall act in any such case in which he is interested, or when he is employed by any party in interest or related to any party in interest by consanguinity or affinity within the third degree, as determined by the common law.

INVESTIGATIONS BY THE COMMISSION

SEC. 41. (a) The commission shall make studies and investigations with respect to safety provisions and the causes of injuries in employments covered by this Act, and shall from time to time make to Congress and to employers and carriers such recommendations as it may deem proper as to the best means of preventing such injuries.

(b) In making such studies and investigations the commission is authorized (1) to cooperate with any agency of the United States charged with the duty of enforcing any law securing safety against injury in any employment covered by this Act, or with any State

agency, engaged in enforcing any laws to assure safety for employees, and (2) to permit any such agency to have access to the records of the commission. In carrying out the provisions of this section the commission or any officer or employee of the commission is authorized to enter at any reasonable time upon any premises, tracks, wharf, dock, or other landing place, or upon any vessel, or to enter any building, where an employment covered by this Act is being carried on, and to examine any tool, appliance, or machinery used in such employment.

TRAVELING EXPENSES

SEC. 42. The commissioners, deputy commissioners, and other employees of the commission shall be entitled to receive their necessary traveling expenses and expenses actually incurred for subsistence while traveling on official business and away from their designated stations, as provided by the Subsistence Expense Act of 1926.

ANNUAL REPORT

SEC. 43. The commission shall make to Congress at the beginning of each regular session a report of the administration of this Act for the preceding fiscal year, including a detailed statement of receipts of and expenditures from the funds established in sections 44 and 45, together with such recommendations as the commission deems advisable.

SPECIAL FUND

SEC. 44. (a) There is hereby established in the Treasury of the United States a special fund for the purpose of making payments in accordance with the provisions of subsections (f) and (g) of section 8 of this Act. Such fund shall be administered by the commission. The Treasurer of the United States shall be the custodian of such fund, and all moneys and securities in such fund shall be held in trust by such Treasurer and shall not be money or property of the United States.

(b) The Treasurer is authorized to disburse moneys from such fund only upon order of the commission. He shall be required to give bond in an amount to be fixed and with securities to be approved by the Secretary of the Treasury and the Comptroller General of the United States conditioned upon the faithful performance of his duty as custodian of such fund.

(c) Payments into such fund shall be made as follows:

(1) Each employer shall pay $1,000 as compensation for the death of an employee of such employer resulting from injury where the deputy commissioner determines that there is no person entitled under this Act to compensation for such death. Fifty per centum of each such payment shall be available for the payments under subdivision (f) of section 8, and 50 per centum shall be available for payments under subdivision (g) of section 8.

(2) All amounts collected as fines and penalties under the provisions of this Act shall be paid into such fund.

(d) The Treasurer of the United States shall deposit any moneys paid into such fund into such depository banks as the commission may designate and may invest any portion of the funds which, in the opinion of the commission, is not needed for current requirements, in bonds or notes of the United States or of any Federal land bank.

(e) Neither the United States nor the commission shall be liable in respect of payments authorized under section 8 in an amount greater than the money or property deposited in or belonging to such fund.

(f) The Comptroller General of the United States shall audit the account for such fund, but the action of the commission in making payments from such fund shall be final and not subject to review, and the Comptroller General is authorized and directed to allow credit in the accounts of any disbursing officer of the commission for payments made from such fund authorized by the commission.

(g) All civil penalties provided for in this Act shall be collected by civil suit brought by the commission.

ADMINISTRATION FUND

SEC. 45. (a) There is hereby established in the Treasury of the United States a special fund for the purpose of providing for the payment of all expenses in respect of the administration of this act. Such fund shall be administered by the commission. The Treasurer of the United States shall be the custodian of such fund, and all moneys and securities in such fund shall be held in trust by such Treasurer and shall not be the money or property of the United States.

(b) The provisions of subdivisions (b), (d), and (f) of section 44 shall be applicable to the fund hereby established.

APPROPRIATION

SEC. 46. (a) There is hereby authorized to be appropriated, out of any money in the Treasury not otherwise appropriated, the sum of $250,000, which shall be covered into the administration fund established in section 45 and shall be available for expenses incurred in the administration of this Act during the remainder of the fiscal year ending June 30, 1927, and during the fiscal year ending June 30, 1928. All unexpended balances of any appropriations made under authority of this section, remaining in such fund on July 1, 1928, shall be covered into the Treasury of the United States as miscellaneous receipts.

AVAILABILITY OF APPROPRIATIONS

SEC. 47. The expenses incurred for salaries and contingent expenses by the United States Employees' Compensation Commission in the administration (1) of the Act entitled "An Act to provide compensation for employees of the United States suffering injuries while in the performance of their duties, and for other purposes," approved

September 7, 1916, as amended, and (2) of this Act, may be paid from the appropriations for salaries and contingent expenses for the administration of such Act of September 7, 1916, and from the fund established in section 45 of this Act, in such proportion as the commission, with the approval of the Director of the Bureau of the Budget, determines to be fairly attributable to the cost of administration of the respective Acts, but the total amount paid from such appropriation and such fund in any fiscal year on account of the administration of such Act of September 7, 1916, shall not exceed the amounts appropriated for salaries and contingent expenses for the administration of such Act for such year.

LAWS INAPPLICABLE

SEC. 48. Nothing in sections 4283, 4284, 4285, 4286, or 4289 of the Revised Statutes, as amended, nor in section 18 of the Act entitled "An act to remove certain burdens on the American merchant marine and encourage the American foreign carrying trade, and for other purposes," approved June 26, 1884, as amended, shall be held to limit the amount for which recovery may be had (1) in any suit at law or in admiralty where an employer has failed to secure compensation as required by this Act, or (2) in any proceeding for compensation, any addition to compensation, or any civil penalty.

EFFECT OF UNCONSTITUTIONALITY

SEC. 49. If any part of this Act is adjudged unconstitutional by the courts, and such adjudication has the effect of invalidating any payment of compensation under this Act, the period intervening between the time the injury was sustained and the time of such adjudication shall not be computed as a part of the time prescribed by law for the commencement of any action against the employer in respect of such injury; but the amount of any compensation paid under this Act on account of such injury shall be deducted from the amount of damages awarded in such action in respect of such injury.

SEPARABILITY PROVISION

SEC. 50. If any provision of this Act is declared unconstitutional or the applicability thereof to any person or circumstances is held invalid, the validity of the remainder of the Act and the applicability of such provision to other persons and circumstances shall not be affected thereby.

EFFECTIVE DATE

SEC. 51. Sections 39 to 51, inclusive, shall become effective upon the passage of this Act, and the remainder of this Act shall become effective on July 1, 1927.

Approved, March 4, 1927.

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Refusal to appear, etc., sec. 27 (b)

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CHARLES ELMORE

No. 19

In the Supreme Court of the United States

OCTOBER TERM, 1931

LETUS N. CROWELL, AS DEPUTY COMMISSIONER FOR THE SEVENTH COMPENSATION DISTRICT OF THE UNITED STATES EMPLOYEES' COMPENSATION COMMISSION, PETITIONER

v.

CHARLES BENSON

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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In the Supreme Court of the United States

OCTOBER TERM, 1931

No. 19

LETUS N. CROWELL, AS DEPUTY COMMISSIONER FOR the Seventh Compensation District of the United States Employees' Compensation Commission, petitioner

v.

CHARLES BENSON

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

In the brief for the respondent filed in this case two arguments have been advanced to which it is desired to make reply in this brief. These are: (1) that the questions relied on as error in this Court were not raised in the courts below and consequently are not open for review here; and (2) that the question whether Knudsen was in fact employed by Benson was a jurisdictional question

which required judicial determination in the district court despite the finding of the Deputy Commissioner.

I

We believe that the record shows plainly that the questions relied on in this Court are properly open for review. The bill of complaint in the district court included as an exhibit (R. 7–8) the findings of fact and the award of the Deputy Commissioner. One of these findings was that "the claimant above named was in the employ of the employer above named." Both the Deputy Commissioner and the claimant filed motions to dismiss (R. 12–14, 14–16) in which the following, among other, reasons for dismissal of the bill were advanced (R. 13, 15):

> 2. The facts alleged do not show that there was no competent evidence before the deputy commissioner to support his order sought to be enjoined.
>
> 3. For aught that appears, the evidence before the deputy commissioner was in conflict, and the order complained of was based on the deputy commissioner's findings on disputed issues of fact, which findings are supported by competent evidence.
>
> 4. Because the findings of the deputy commissioner on issues of fact are conclusive, unless there is no competent evidence to sustain such findings; and, for aught alleged, evidence was offered to sustain such findings.

5. Because it appears that the order sought to be enjoined was an order of an officer of the administrative department of the Federal Government; and it is not alleged that there was no competent evidence before said officer to support his findings upon which the order sought to be enjoined is based.

6. Because the bill of complaint does not set forth, in whole or in part, the evidence or proof which was submitted to the deputy commissioner at the hearing on which the order, prayed to be enjoined, was entered.

The record then shows that the motion to dismiss was argued in open court and taken under submission. (R. 16.) Thereafter the court rendered its opinion, upon which an order was entered referring to the opinion and overruling the motion to dismiss. (R. 18–25, 26.) The order itself recites that the respondents each except to the ruling. (R. 26.) The grounds of the respondents' motions were thus not only shown in the motions themselves (R. 13, 15) but the court, in denying the motions, concluded that the statute authorized the court to go into the real facts and grant a hearing *de novo;* that the proper court for an injunction to be brought was the admiralty side of the court; that the motion to dismiss would be overruled, and that the court would grant a hearing on the facts and the law (R. 25). To this ruling exceptions were allowed in the order of the court. (R. 26.)

Thereafter the claimant and the Deputy Commissioner took part in a trial *de novo* before the district court which was a necessary consequence of the order overruling their motion to dismiss, to which order they had excepted. At this trial *de novo* the record of proceedings before the Deputy Commissioner was offered and received in evidence. (R. 83–176.) But the Court did not read this record. (R. 176.) In its decree after reciting the *de novo* hearing and its opinion that complainant was not in fact the employer of the respondent Knudsen at the time of the latter's injury and that the complainant Charles Benson should have a decree in his favor, the Court proceeded to decree and adjudge that Knudsen was not in Benson's employ at the time his injuries were sustained and was not entitled to recover therefor from Benson any sum or sums by virtue of the provisions of the Longshoremen's and Harbor Workers' Compensation Act; that the award was not in accordance with law, that the respondents should both be restrained and enjoined from enforcing it, and that the claim for compensation should be rejected and dismissed. (R. 176–177.) The decree itself recites that each of the respondents upon the rendition thereof reserved an exception thereto, and to each paragraph thereof separately. (R. 177.)

Thereafter the respondents filed assignments of error in which the present question was expressly raised. (R. 178–180, 181–183.) The Circuit Court of Appeals considered the question and decided it

(R. 185–190), and the question was assigned as error in this Court. We believe that these references to the record make it clear that the question which we are urging is properly presented on the record.

II

The respondent contends that the question whether Knudsen was or was not in Benson's employ at the time of the injury is a "jurisdictional" question on which the finding of fact of the Deputy Commissioner is not conclusive. Whether or not the question is "jurisdictional" must depend upon the power which has been granted to the Deputy Commissioner. The question thus becomes one of the proper construction of the Longshoreman's Act.

An examination of the Act discloses an intention to grant very broad powers to the Deputy Commissioner with respect to the determination of questions which are disputed before him. Section 19 (a) provides for the filing of claims and that—

> the deputy commissioner shall have full power and authority to hear and determine *all questions* in respect of such claim. (Italics ours.)

By Section 20 it is provided that in the absence of substantial evidence to the contrary it shall be presumed "that the claim comes within the provisions of this Act." Clearly Congress had power to grant the Deputy Commissioner authority to determine the question of fact involved in the

present case; and the statute discloses the purpose of Congress to grant the Deputy Commissioner full authority to determine *all questions* raised before him.

The precise question of fact raised before the Deputy Commissioner in the present case was whether Knudsen was an employee of Benson, or on the other hand, as Benson claimed, an independent contractor. The respondent cites several decisions of state courts to the effect that such a question is a jurisdictional one which can not finally be determined by an administrative commission. Of course, the question depends in each State upon the language of the Act granting power to the commission and State decisions, we feel, are of little aid in considering the present question. Nevertheless we believe that practically all of the State decisions support the view that the administrative determination of the question whether the claimant was in fact employed or not is conclusive on the courts when it is supported by the evidence. This result has been reached in the State cases which are listed below. Except where it is otherwise indicated, the issue in these cases was the same as that involved in the present case, namely, whether the claimant was an employee or an independent contractor.

California:

Hillen v. *Industrial Accident Commission,* 199 Cal. 577 (whether claimant was an employee or not).

York Junction Transfer & Storage Co. v. *Industrial Accident Commission,* 202 Cal. 517.

Colorado: *Index Mines Corporation* v. *Industrial Commission,* 82 Colo. 272 (whether employee or colessee).

Georgia: *Ocean Accident & Guarantee Corp.* v. *Wilson,* 36 Ga. App. 784.

Idaho: *Taylor* v. *Blackwell Lumber Co.,* 37 Idaho 707.

Illinois:

Cinofsky v. *Industrial Commission,* 290 Ill. 521.

Franklin Coal Co. v. *Industrial Commission,* 296 Ill. 329.

Indiana:

A. E. Norris Coal Co. v. *Jackson,* 80 Ind. App. 423.

Riley v. *Hunt,* 85 Ind. App. 647 (claimant held not an employee and finding held conclusive on his appeal).

Garden City Sand Co. v. *Abney,* 85 Ind. App. 657.

Iowa:

Root v. *Shadbolt & Middleton,* 195 Iowa 1225, 1237 (whether claimant was employed by A or B).

Murphy v. *Shipley,* 200 Iowa 857 (same).

Massachusetts:

Churchill's Case, 265 Mass. 117.

Beckford's Case, 268 Mass. 221 (claimant held not an employee and this finding held conclusive on his appeal).

Hill's Case, 268 Mass. 491.

Missouri: See *Kersey* v. *Conrad,* 30 S. W. (2d) 167, 169 (Mo. App.; not officially reported).

New York: *Matter of Dale* v. *Saunders Bros.,* 218 N. Y. 59 (whether claimant was employed by A or B).

Oklahoma:

Missouri Valley Bridge Co. v. *State Industrial Commission,* 86 Okla. 209.

Federal Mining & Smelting Co. v. *Thomas,* 99 Okla. 24.

Oklahoma Pipe Line Co. v. *Lindsey,* 113 Okla. 296.

Pennsylvania: *Belmonte* v. *Connor,* 263 Pa. 470.

The decisions upon which the respondent relies are cited on page 21 of his brief. We believe that most of these cases are distinguishable.

Nogueira v. *New York, N. H. and H. R. Co.,* 281 U. S. 128, apparently has no bearing on the present question. *Crowell* v. *Benson,* 45 F. (2d) 66, is the decision of the court below.

In *Pine* v. *State Industrial Commission,* 108 Okla. 185, it appeared that at the time of the injury the statute then in force (Section 1, Art. 2, c. 246, Oklahoma Laws, 1915; Oklahoma Comp. Stat. 1921, Sec. 285) provided "that the provisions of this Act shall not apply to any employer unless he shall employ more than two workmen."

It was held that the question whether there were more than two or more employees was a jurisdictional matter which could be raised at any time.

There was no evidence in the record to show that there were more than two employees, and the court said that the question thus raised was not one of fact but one of law as to the existence of any evidence to support the jurisdiction of the Commission.

Borgnis v. *Falk Co.*, 147 Wis. 327, was one of the early cases in which the constitutionality of workmen's compensation laws was considered. In holding the Wisconsin elective compensation act constitutional the court said that jurisdictional questions could be reviewed by the courts. But the only jurisdictional question mentioned was whether the employer had elected to come under the act or not, and even that question was not directly involved in the case.

Hunter v. *Colfax Consolidated Coal Co.*, 175 Iowa 245, contains a dictum (p. 318) to the effect that the question of employment is jurisdictional. This was followed in *Bidwell Coal Co.* v. *Davidson*, 187 Iowa 809. But the Iowa Court since that decision has decided to the contrary. In *Root* v. *Shadbolt & Middleton*, 195 Iowa 1225, 1237, *supra*, and in *Murphy* v. *Shipley*, 200 Iowa 857, *supra*, it was held that the question whether the claimant was employed by A or by B was a question of fact on which the finding of the Commission was conclusive when supported by the evidence.

The decisions cited by the respondent from Illinois hold that jurisdictional questions may be re-

viewed by the courts, but none of them involves precisely the issue presented in the present case. *Courter* v. *Simpson Construction Co.*, 264 Ill. 488, decided only that, under the Illinois Constitution, the provision in the Workmen's Compensation Act for direct review of orders of the Commission by the Supreme Court was invalid. In *Uphoff* v. *Industrial Board,* 271 Ill. 312, the court made the statement that it might review jurisdictional questions, but the issue in the case was whether the defendant, a farmer, was of the class of employers who were subject to the provisions of the Act. In *Hahnemann Hospital* v. *Industrial Board,* 282 Ill. 316, the issue was whether the defendant's business was extra hazardous so as to make it subject to the Act. The finding of the commission that the claimant was employed was upheld. In *Thede Bros.* v. *Industrial Commission,* 285 Ill. 483, the question whether the claimant's employment was casual or not was held jurisdictional and subject to review by the courts. In *Paul* v. *Industrial Commission,* 288 Ill. 532, the court repeated the statement that it was free to determine jurisdictional questions; but the only question involved was whether the employer had elected to come under the Act.

When the precise question was presented to the Illinois court it held that the Commission's finding that the claimant was an employee and not an independent contractor was conclusive when there was evidence to support it. *Cinofsky* v. *Industrial*

Commission, 290 Ill. 521, *supra; Franklin Coal Co.* v. *Industrial Commission,* 296 Ill. 329, *supra.*

The respondent cites two cases from California (*Donlon Bros.* v. *Industrial Accident Commission,* 173 Cal. 250; *Roberts* v. *Industrial Accident Commission,* 52 Cal. App. 31) in which it was held that the question whether the claimant was an employee or an independent contractor was a jurisdictional question which was open to review in the courts. Other cases reaching the same result are: *Great Western Power Co.* v. *Pillsbury,* 170 Cal. 180; *Western Indemnity Co.* v. *Pillsbury,* 170 Cal. 686. These cases undoubtedly did represent the law of California until about ten years ago. But since that time the California Supreme Court has twice held that a finding that the claimant was an employee and not an independent contractor is conclusive when supported by evidence, and we believe that this is the law in California at the present time. *Hillen* v. *Industrial Accident Commission,* 199 Cal. 577, *supra; York Junction Transfer & storage Co.* v. *Industrial Accident Commission,* 202 Cal. 517, *supra.*

The final case cited by the respondent is *Industrial Commission* v. *Evans,* 52 Utah 394. The respondent relies on a dictum appearing at page 404. It appeared that under the terms of the Utah Act some employers were subject to its provisions and some were not. The only question decided by the court was that whether a certain

employer was subject to the Act or not is a jurisdictional question which may be reviewed by the courts. No question was raised as to whether the claimant involved was an employee or not.

CONCLUSION

We believe that the questions now urged in our brief are properly presented on the record and that the court below erred in disregarding the findings of the Deputy Commissioner and the evidence in support thereof and determining *de novo* the issue of employment.

Respectfully submitted.

THOMAS D. THACHER,
Solicitor General.
ERWIN N. GRISWOLD,
WILBUR H. FRIEDMAN,
Attorneys.

OCTOBER, 1931.

U. S. GOVERNMENT PRINTING OFFICE: 1931

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CHARLES ELMORE

Nos. 19 - 20

In the Supreme Court of the United States

OCTOBER TERM, 1930

No. ——

LETUS N. CROWELL, AS DEPUTY COMMISSIONER For the Seventh Compensation District of the United States Employees' Compensation Commission, Petitioner

vs.

CHARLES BENSON

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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In the Supreme Court of the United States

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No. ——

LETUS N. CROWELL, AS DEPUTY COMMISSIONER For the Seventh Compensation District of the United States Employees' Compensation Commission, Petitioner

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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

BRIEF IN OPPOSITION TO PETITION

NO FINDING OF FACTS BY COMMISSIONER

In the case at bar, because the Commissioner did not make any Finding of Facts, the judgment of the District Court and that of the Circuit Court of Appeals is right, no matter what the rule may be in cases where a proper Finding of Facts has been made.

Here the Deputy Commissioner did not make any Finding of Facts upon which he based his con-

clusion that the relationship of employer and employee existed between the parties, but merely stated his legal conclusion that the relationship existed. The Circuit Court's opinion further points out that it could not be ascertained from the alleged Finding of Facts as made by the Deputy Commissioner, what facts he considered to have the result of creating that relationship. The opinion of Circuit Judge Walker on this point states:

> "If the court was restricted to a consideration of only the evidence which the deputy commissioner had before him, an anomalous situation was presented in the instant case. As above indicated, the only conclusion stated by the deputy commissioner on the subject of the relationship between the claimant and appellee was the one found in the above set out quotation from the deputy commissioner's order. That was a statement of his legal conclusion that the relationship mentioned existed. What facts he considered to have the result of creating that relationship are not disclosed. Though in the hearing before him there was testimony tending to prove facts from which the existence of that relationship arose, it was not made to appear that the deputy commissioner in reaching his legal conclusion had in mind such facts, or that he was influenced by that evidence or accorded to it any probative value. There was nothing before the court to negative the inference that the stated legal conclusion of the deputy commissioner was based entirely on what he or some other person saw or heard in an investigation or

inquiry other than in the hearing in which was adduced evidence which was brought before the court. What was seen or heard in such other investigation or inquiry was not made known to the court in any way. The record does not show that the deputy commissioner found any fact or state of facts having any bearing on the question of the existence vel non of the relation of employer and employee between the appellee and the claimant. It does not show that evidence produced in the hearing before the deputy commissioner supported any conclusion of fact reached by him with reference to any relation between the claimant and the appellee. This being so, it does not seem that it properly can be affirmed that evidence disclosed to the court supported any conclusion of fact on that subject actually reached by the deputy commissioner. It can not well be inferred or supposed that it was intended to require a court to give conclusive effect to a finding of fact made by an executive official when it is not made known to the court what that finding was, or that evidence which was before that official supported that finding."

Rec. P. 301.

Absent any true Finding of Facts, the District Judge clearly did not err in proceeding to hear the case de novo when it came on for trial before him, and his action in so doing manifestly contributed more to a speedy disposition of the matter than would have ensued had he merely remanded the

cause, to the Commissioner with instructions to find the facts.

Whatever may be the rule where the Commissioner has made a proper Finding of Facts, and where that finding shows that the conclusion of the Comsioner was reached solely upon the evidence adduced at the hearing, it is submitted that the Circuit Court properly affirmed the action of the District Court in granting a trial de novo in the instant case.

Besides, the right to a trial de novo by a court of competent jurisdiction is clearly established by this court in the case of Liu Hop Fong vs. United States, 209 U. S. 453, 461-2. In the instant case there exists every consideration that led the Supreme Court of the United States to hold in the above cited case that Liu Hop Fong was entitled to a trial de novo.

The power of Congress to legislate in the field covered by the Longshoremen's and Harbor Workers Compensation Act rests entirely upon Federal jurisdiction over causes of admiralty and maritime jurisdiction. It results that a petition under the Act to review an award made by the Commissioner is properly heard on the admiralty side of the court, and the decision by this court in Axel Langnes vs. Winfield A. Green (case No. 38 decided February 24, 1931) lends support to that idea and to the pro-

position that the District Judge properly granted a trial de novo upon the facts as well as the law.

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WILLIAM G. CAFFEY,
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Solicitors for the
Respondent, Benson.

OUTLAW, KILBORN & SEALE,
HARRY T. SMITH & CAFFEY,

All of Mobile, Alabama, of Counsel.
March 4th, 1931.

CERTIFICATE OF SERVICE ON OPPOSING COUNSEL

I hereby certify that on the 4th day of March, 1931, I mailed a copy of the foregoing brief to the Solicitor General of the United States, addressed to him at Washington, D. C., by registered mail, postage prepaid, and that on the same day I delivered a copy of said brief to Messrs. Pillans, Cowley & Gresham, of Mobile, Alabama, Solicitors for J. B. Knudsen.

VINCENT F. KILBORN,
Solicitor for Respondent, Benson.

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No. ~~221~~ 20

Supreme Court of the United States

OCTOBER TERM, 1930

LETUS N. CROWELL, as Deputy Commissioner for the Seventh Compensation District of the United States Employees' Compensation Commission; and J. B. KNUDSEN, Petitioners,

v.

CHARLES BENSON

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

Supreme Court of the United States

OCTOBER TERM, 1930

No. ——

LETUS N. CROWELL, as Deputy Commissioner for the Seventh Compensation District of the United States Employees' Compensation Commission; and J. B. KNUDSEN, Petitioners,

v.

CHARLES BENSON

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

J. B. Knudsen prays that a writ of certiorari issue to review the judgment of the United States Circuit Court of Appeals for the Fifth Circuit entered in the above case on November 17, 1930 (R. 302), affirming the decision of the United States District Court for the Southern District of Alabama.

Petitioner incorporates by reference the entire petition of The Solicitor General of the United

States, filed in this Court on behalf of Letus N. Crowell, Deputy Commissioner for the Seventh Compensation District of the United States Employees' Compensation Commission, to review the aforesaid judgment of the United States Circuit Court of Appeals for the Fifth Circuit; and petitioner respectfully asks that he be allowed to adopt the said petition as his own, and that he be allowed to join in the said petition as fully as though said petition had been filed by him.

And your petitioner further represents and shows unto the Honorable Court that he relies, in support of this petition, upon the brief and argument filed herein by The Solicitor General of the United States in support of his said petition on behalf of said Crowell; and your petitioner prays that this Honorable Court will be pleased to consider the said brief and argument so filed by the Honorable Solicitor General as your petitioner's brief and argument, adopted and filed by him in support of his petition; and your petitioner will ever pray.

J. B. KNUDSEN,
By PALMER PILLANS,
ALEXIS T. GRESHAM,
Counsel for Petitioner.

PILLANS, COWLEY & GRESHAM,
of Counsel.

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No. 20

In the Supreme Court of the United States

OCTOBER TERM, 1931

LETUS N. CROWELL, as Deputy Commissioner for the Seventh Compensation District of the United States Employees' Compensation Commission; and J. B. KNUDSEN, Petitioners,

vs.

CHARLES BENSON

BRIEF FOR THE PETITIONER, J. B. KNUDSEN

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No. 20

In the Supreme Court of the United States

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LETUS N. CROWELL, as Deputy Commissioner for the Seventh Compensation District of the United States Employees' Compensation Commission; and J. B. KNUDSEN, Petitioners,

vs.

CHARLES BENSON

BRIEF FOR THE PETITIONER, J. B. KNUDSEN

Petitioner, J. B. Knudsen, adopts the brief and argument filed by the Solicitor General in the case before this Court Numbered 19, and styled "Letus N. Crowell, as Deputy Commissioner for the Seventh Compensation District of the United States Employees' Compensation Commission, Petitioner, vs. Charles Benson;" and petitioner prays that this Court will consider said brief of the Solicitor General as filed on his behalf as well as on behalf of the Government.

Petitioner adds to the brief and argument of the Solicitor General, so adopted by him, the following:

THE CONGRESS MAY WITHIN THE ADMIRALTY GRANT OF JUDICIAL POWER IN THE CONSTITUTION, ENACT A MARITIME WORKERS' COMPENSATION ACT, INVESTING AN ADMINISTRATIVE OFFICER WITH POWER TO REACH CONCLUSIONS OF FACT IN PROCEEDINGS UNDER THAT ACT, BINDING UPON THE DISTRICT COURTS IF SUPPORTED BY ADEQUATE EVIDENCE.

SUMMARY OF THE ARGUMENT

The question before this Court relates solely to the procedural provisions of the Act. The makers of the Constitution were not concerned with fixing the jurisdiction of the lower courts of the general government as between Congress and the judiciary, much less with establishing the procedure of such courts. To reach the conclusion found by the courts below, it must be held that the Constitution denies the right of the Congress to fix the procedure of the lower federal courts in respect to the determination of facts. But even the states may in matters of mere local concern exclude the jurisdiction of the admiralty courts over cases, to which the jurisdiction otherwise would extend. However the power of the Congress in the maritime field is broad and paramount. By it the maritime law, from time to time, has been materially changed and altered, the jurisdiction of the lower Federal Courts defined and restricted, the procedure of the District

Courts sitting in admiralty defined and regulated. In fields of congressional activity, other than the maritime field, specific illustrations of the power of the Congress to restrict the jurisdiction in the first instance of the inferior Federal Courts, are found. That power has, by the decisions of this Court, in terms and effect, been held constitutionally exercised. The extension of judicial power of the United States to the cases enumerated in the Constitution is not confined to original jurisdiction. Jurisdiction, either original or appellate, may extend (save in certain cases before this Court) as Congress wills. There is no distinction in the congressional grants of judicial power between the field of maritime activity and other fields entrusted to the general government. If the Congress may restrict the jurisdiction of the inferior Federal Courts to limits beyond which those Courts had theretofore exercised jurisdiction, as respecting cases arising under the Constitution and laws of the United States, it may so limit cases within the admiralty and maritime jurisdiction. *A fortiori* Congress may in a proceeding under a maritime workers' compensation act, require determinations of fact in the first instance to be reached by an administrative officer.

ARGUMENT

The findings and conclusions of the lower courts, respecting the Constitutional inability of the Congress to authorize an administrative officer or board to reach conclusions of fact, binding if supported by adequate or sufficient evidence, in proceedings under the Longshore-

men's and Harbor Workers' Compensation act, do neither suggest nor even hint the invalidity of the substantive provisions of that enactment. Upon the contrary, the conclusions of the lower court indicate they considered that those provisions which change the maritime rule of liability of the employer to his servant, excluding fault as the basis of recovery, wipe out possible actions *in rem* according to the course of admiralty proceedings, and substitute a remedy according to the course of the common law, i.e., *in personam* (Sec. 18), were constitutionally enacted. Indeed, in view of the affirmance by this Court of the power of Congress to enact a maritime workmen's compensation act[1] the validity of the general scheme or outline of the legislation is foreclosed.

The question for decision by this Court relates solely to the procedural provisions of the act. It is restricted to whether the Constitution prohibits the Congress from entrusting to an administrative officer power to determine the existence *vel non* of facts within the Act's class or condition. The following remarks deal with that question solely in respect to whether those provisions of the Constitution, vesting in the judicial power of the United States jurisdiction of "all cases of admiralty and maritime jurisdiction," prohibit the Congress from so entrusting that power.

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[1] "Without doubt, Congress has power to alter, amend or revise, the maritime law by statutes of general application embodying its will and judgment. This power, we think, would permit enactment of a general employers' liability law, or general provisions for compensation of employees * * *"

Washington vs Dawson Co., 264 U. S., 219, 227.

Necessarily the Constitution deals in general language.[2] It does not provide for minute specifications of its powers nor declare the means by which those powers should be carried into execution. Its framers could not see the future growth and development of the nation, neither could it be foreseen what new changes and modifications of power might be necessary to effecuate the general objects of the charter. Restrictions and limitations, while proper at the time of the adoption of the Constitution, might in the end proye the overthrow of the system itself. Hence the powers are granted in general terms, leaving to the Congress from time to time to adopt its own means to effectuate legitimate objects, and to mould and model the exercise of those powers, as the wisdom of Congress and public interest might require. Of the powers delineated, those of the judiciary are granted in most general terms.[3] The jurisdiction of all Federal Courts, over vast fields of activity, touching the lives of millions of people, is constitutionally granted in a few short sentences.

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[2]**Martin v. Hunter's Lessee**, 1 Wheaton 304, 326.

[3]**The constitutional grant of judicial power, as here apposite is: "The Congress shall have power * * * to constitute Tribunals inferior to the Supreme Court * * * to make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other Powers vested by this Constitution in the Government of the United States, or in any Department or Officer thereof." (Art. 1, Sec. 8, Cls. 9. 18). "The judicial Power of the United States shall be vested in one Supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish." (Art. III., Sec. 1.) "The Judicial Power shall extend to all cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and**

Illustrations of the exercise of power by the Congress, held authorized by the admiralty grant, demonstrate that in the past the Legislature has exercised control of the subject-matter under discussion in more vital and far-reaching particulars than we insist it has done by the Act in question.

Upon the adoption of the Constitution, Congress forthwith enacted the original Judiciary Act, granting to the District Courts exclusive original jurisdiction of all civil causes of admiralty and maritime jurisdiction.[4] To that enactment was added a saving clause by virtue of which State Courts have adjudicated numberless

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Treaties made, or which shall be made, under their authority;—to all Cases affecting Ambassadors, other Ministers and Consuls;—to all cases of admiralty and maritime Jurisdiction;—to Controversies between two or more State;—between a State and Citizens of another State;—between citizens of different States;— * * * . In all Cases affecting Ambassadors, other Public Ministers and Consuls, and those in which a State shall be Party, the Supreme Court shall have original jurisdiction. In all the other Cases before mentioned, the Supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such exceptions and under such Regulations as the Congress shall make." (Art. III., Sec. 2).

[redacted]

[4]"That the District Courts shall * * * also have exclusive original cognizance of all civil causes of admiralty and maritime jurisdiction, including all seizures under laws of impost, navigation or trade of the United States, where the seizures are made, on waters which are navigable from the sea by vessels of ten or more tons burden, within their respective districts as well as upon the high seas; saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it." Act of September 24, 1789, 1 Stat. 73, 76, 77.

causes of action, arising upon navigable waters or dealing with maritime subjects.

From the opinion of one of the great cases,[5] we find it said that the Congress might rightfully have vested exclusive jurisdiction in its own courts in all cases to which the judicial power extended. Yet by that saving clause, Congress invested the courts of common law, State and Federal, with original cognizance of a great number of causes of action, civil and maritime,[6] which, had Congress willed, would have been exclusively within the powers of the Federal Courts of Admiralty.

In what is perhaps the most celebrated of the great admiralty cases before this Court (*The Propeller Genessee Chief* v. *Fitzhugh*, 12 Howard 443, 459, 460), we find this pronouncement:

> "The power of Congress to change the mode of proceeding in this respect (the right of trial by jury in the admiralty) in its courts of admiralty, will, we suppose, hardly be questioned. The Constitution declares that the judicial power of the United States shall extend to 'all cases of admiralty and maritime jurisdiction.' But it does not direct that the court shall proceed according to ancient and established forms, or shall adopt any other form or mode of practice. The grant defines

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[5] Martin vs Hunter's Lessee, supra, [1 Wheat. 337.]

[6] "By reason of the saving clause (of the Judiciary Act of Sept. 24, 1789, c. 20, Sec. 9, 1 Stat. 73, 77), State Courts have jurisdiction in personam, concurrent with the admiralty courts of all causes of action maritime in their nature arising under charter parties." Red Cross Line vs Atlantic Fruit Co., 264 U. S. 123.

> the subjects to which the jurisdiction may be extended by Congress. But the extent of the power as well as the mode of proceeding in which that jurisdiction is to be exercised, like the power and practice in all the other courts of the United States, are subject to the regulation of Congress, except where that power is limited by the terms of the Constitution, or by necessary implication from its language. In admiralty and maritime cases, there is no such limitations as to the mode of proceeding, and Congress may therefore, in cases of that description, give either party right of trial by jury or modify the practice of the Court in any other respect that it deems more conductive to the administration of justice."

The Genesee Chief and several following cases illustrate the broad power of the Congress in the respect under discussion. The first-named case arose as a proceeding *in rem* on the admiralty side of the United States District Court, under the Act of February 26, 1845, (5 Stat. 726) by reason of a collision upon one of Great Lakes. Jurisdiction was denied because (so the argument ran) the Constitution confined the admiralty jurisdiction to tide waters. By the original Judiciary Act of 1789, jurisdiction in the admiralty was limited to the high seas, and waters navigable therefrom by vessels of ten tons burden and upwards. By the Act of 1846,[7] Congress purported to extend the jurisdiction to the Great Lakes and connecting waters, with restrictions, however, which were not included in the original act. After the *Genesee Chief* sustained the constitutionalty of the Act of 1845, the case of the *Magnolia* (20 Howard 296) arose. In that case it

was contended that inasmuch as the Genesee Chief determined that the Act of 1845[7] conferred a new jurisdiction, which the court did not before possess, and as that act was confined to the lakes, it could not authorize the district courts to assume jurisdiction over the subject-matter of that suit, viz., a collision upon the Alabama River, the navigable portion of which lay wholly within the confines of the State of Alabama. In answering this contention, this Court says, in part, as follows:

> "The Constitution, in defining the powers of the Courts of the United States, extends them to 'all cases of admiralty and maritime jurisdiction.' It defines how much of the judicial power shall be exercised by the Supreme Court only; and it was left to Congress to ordain and establish other courts, and to fix the boundary and extent of their

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7" * * * the District Courts of the United States shall have, possess, and exercise, the same jurisdiction in matters of contract and tort, arising in, upon, or concerning, steam boats and other vessels of twenty tons burden and upwards, enrolled and licensed for the coasting trade, and at the time employed in business of commerce and navigation between ports and place in different States and Territories upon the lakes and navigable waters connecting said lakes, as is now possessed and exercised by the said courts in cases of the like steamboats and other vessels employed in navigation and commerce upon the high seas or tide waters, within the admiralty and maritime jurisdiction of the United States; * * * saving, however, to the parties the right of trial by jury of all facts put in issue in such suits, where either party shall require it; and saving also to the parties the right of a concurrent remedy at the common law, where it is competent to give it, and any concurrent remedy which may be given by the State laws, where such steamer or other vessel is employed in such business of commerce and navigation." Act of February 26, 1845, 5 Stat. 726-7.

> respective jurisdictions. Congress might give any of these courts the whole or so much of the admiralty jurisdiction as it saw fit. It might extend their jurisdiction over all navigable waters, and all ships and vessels thereon, or over some navigable waters, and vessels of a certain description only. Consequently, as Congress had never before 1845 conferred admiralty jurisdiction over the northern fresh water lakes *not* 'navigable from the sea,' the district courts could not assume it by virtue of this clause in the Constitution."
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> *The Steamboat Magnolia,* 20 Howard 296, 300, 301.

The power of Congress, as illustrated by the Act of 1845, to confine the admiralty jurisdiction within narrower limits than are given by the constitutional grant, is reaffirmed in *The Hine* v. *Trevor,* 4 Wallace 555, where it is held that while the admiralty grant by the Act of 1789 is coextensive with the Constitution, as to the character of the waters over which it extends; the Act of 1845 is a limitation of the powers granted by the act of 1789, as regards cases arising upon the lakes, in that the admiralty jurisdiction is there limited to vessels of twenty tons burden and upwards, in the coasting trade, employed in commerce between the States, a jury trial is granted, and the jurisdiction is not exclusive of, but is expressly made concurrent with, state remedies.

Under the Act of 1845, we actually find a case of collision occurring upon navigable waters of the United States, of which the district courts, sitting in admiralty, were without jurisdiction.

Allen v. *Newberry,* 21 Howard 244.

While the Congress was constitutionally empowered

to vest in the Federal Courts jurisdiction greater in extent than was originally vested, it is clear that the lawmaking power acted within constitutional limits in vesting only a part of that power. It also follows that jurisdiction in admiralty and maritime cases may not be exercised by the inferior Federal Courts until Congress acts; the admiralty grant being not self-executing. If the Constitution itself vests admiralty jurisdiction to the limits of the grant in the lower Federal Courts upon their creation by the Congress, that body could not validly vest in those courts only a part of that power. If the admiralty grant is self-executing, upon the creation of the lower Federal Courts by the Congress, those courts are vested with all jurisdiction within the spirit and terms of the grant. Such theories are directly contradictory to the reasoning, language, and conclusions of the cited cases.

The right within the admiralty grant of the Congress to entrust an administrative officer with determinations of fact in maritime cases within the Longshoremen's Act may be made clearer by analogy by reference to other illustrations of the valid exercise by the lawmaking body of power over procedure and practice in admiralty cases. For example, upon the passage of the Judiciary Act of 1789, Congress provided (1 Stat. 93-94), that in the admiralty courts, the forms and modes of proceedings should be according to the course of the civil law. But it became evident that if the admiralty used process *in rem* in all cases in which it was authorized by the civil law, unavoidably collision would be had with the common-law courts of the State, where the parties re-

sided, where the property was situated, and where other than owners might have interests in the property, which they had a right to assert at common law. Therefore, three years later (1792), Congress provided that the forms and mode of procedure should be according to the principles, rules and usages which belong to courts of admiralty, subject to such alterations and additions as the courts themselves might deem expedient, or to such regulations as this Court might from time to time prescribe.[8] Under the rule of this Court of 1844, a proceeding *in rem* was authorized, where the municipal law gave a lien for supplies furnished a vessel in her home port. On May 1, 1859, by this Court, this rule was altered and process *in rem* in those classes of cases denied. *The St. Lawrence,* 1 Black 522, arose as a libel *in rem* in the United States District Court for supplies furnished a vessel in her home port, where a state law gave a lien therefor. The owners contended that as the lien was not created by the maritime law, it could not be enforced in the admiralty; moreover, that the rule of 1859, must be regarded as admitting that by the rule of 1844, this Court had exercised a jurisdiction beyond its legitimate boundary: that if the admiralty was without jurisdiction to enforce a State lien in a case of this kind, a rule could not enlarge its jurisdiction nor authorize a decree of the lower court which supported and enforced the lien. In replying to and overruling this contention, it is held:

"These rules refer exclusively to the charac-

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[8]Act of May 8, 1792, 1 Stat. 275. The power of the Supreme Court to regulate admiralty procedure was enlarged by the Act of August 23, 1842. See The Steamer St. Lawrence, 1 Black 522, 528.

ter of the process to be used in certain cases, and this change has no relation to the question of the jurisdiction of the court.

"* * * Congress may prescribe the forms and modes of proceeding in the tribunals which it establishes, and may authorize the court to proceed by attachment against the property, or by arrest of the person, as it may think best.

"* * * the power of this court to frame rules held to extend to the mode of proceeding and to the process to be used, but not to the subject-matter of the jurisdiction."

The Steamer St. Lawrence, 1 Black 522.[9]

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[9]In this case (Opin. pp 528-29) it is further declared: "The case of The General Smith (4 Wheat. 438 was (*529) decided upon these principles, and the right to proceed against the property regarded as a mere question of process and not of jurisdiction. And the court held that where, upon the principles of the maritime code, the supplies are presumed to be furnished on the credit of the vessel, or where a lien is given by the local law, the party is entitled to proceed in rem in the admiralty court to enforce it; but where the supplies are presumed by the maritime code to be furnished on the personal credit of the owner or master, and the local law gives him no lien, although the contract is maritime, yet he must seek his remedy against the person, and not against the vessel. In either case, the contract is equally within the jurisdiction of a court of admiralty. And it is obvious, from this decision, that the court considered the process in rem or priority given for repairs or supplies to a domestic vessel by the courts of admiralty in those countries where the principles of the civil law have been adopted, as forming no part of the general maritime code, but as local laws, and therefore furnishing no precedent for similar cases where the local law is otherwise; consequently they form no part of the admiralty and maritime jurisdiction conferred on the government of the United States.

The power of the Congress over the substantive maritime law is of the broadest extent. It has been declared in two comparatively recent cases before this Court in this language:

> "Considering our former opinions, it must now be accepted as settled doctrine that in consequence of these provisions (the admiralty grant, Con. Art. III, Sec. 2, Art. I., Sec. 8), Congress has paramount power to fix and determine the maritime law which shall prevail throughout the country."
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> *Southern Pacific Co.* v. *Jensen,* 244 U.S. 205, 215
> *Knickerbocker Ice Co.* v. *Stewart,* 253 U. S. 149, 158.

That power has been exercised at different times and in such manner that the maritime law, as it existed at the time of adoption of the Constitution, has been materially and radically changed.[10]

The sole argument advanced against the power of the Congress to confine the determination of issues of

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[10]For example: Act of June 5, 1920, c. 250, Sec. 33, 41 Stat. 1007 (Jones Act), renders the ship-owning employer liable, at a seaman's option, for damages for personal injury caused by fault of a fellow-servant, for which there was no liability at the general maritime law. (The Osceola, 189 U. S. 158). The Merchant Marine Act of 1920 (Ib. Sec. 30), abolishes the distinction of the general maritime law between the furnishing of supplies, materials, etc., in a vessel's home port, by which law no lien arose, and the furnishing of the same in a foreign port, when a lien was created. By that enactment there is no difference as far as a right to a maritime lien is concerned between furnishing a vessel at home and abroad. The same enactment renders it unnecessary (contrary to the general maritime law) that credit be given to

fact to an administrative officer in admiralty cases is upon this theory: By the terms of the grant, judicial power is vested in the lower Federal Courts as fully, definitely and irrevocably as (in certain cases) it is vested in this Court; the Congress being without power to remove or diminish any part of the jurisdiction so granted. As the argument continues, jurisdiction in the lower courts being vested by the Constitution itself, the power of the legislature is confined merely to establishing the Courts; that the constitutional grant in admiralty and maritime cases is by the terms of that instrument made exclusive; therefore, the Congress could not, by empowering an administrative officer to reach conclusions of fact, binding if supported by adequate or sufficient evidence, deprive the District Courts of that power. The argument necessarily assumes that power to determine the existence *vel non* of facts is the exercise of "judicial power" within the constitutional grant.[11]

While the novelty of a line of reasoning is usually no sound answer; nevertheless, the fact that no such thought

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the vessel. By the same enactment maritime mortgages were created and the rules of the general maritime law respecting priorities between those creditors secured by mortgages and those creditors counting on maritime liens, were materially altered.

[11]The record does not disclose an elaboration of the reasoning of the District Court upon the admiralty-grant question here presented. The District Court in its original opinion (R. 20) referred to a former decision, Farrell vs. Waterman S. S. Co., et al, 286 Fed. 284, and 291 Fed. 604. The District Court, however, elaborated its theory in a supplemental opinion reported as Benson vs. Crowell, Deputy Commissioner, etc., 38 Fed. [2] 306.

has presented itself to the Court or counsel in a long line of admiralty cases, in which untiring efforts were made to develop the entire subject, certainly should at least require very clear support for the point.

But the argument of the lower court is, we think, clearly refuted both upon plain authority and reason.

It is thought that the decision and conclusion of this Court in a case which may fairly be described as leading and controlling in this branch of the law maritime, effectually destroys the soundness of the reasoning of the courts below. In that case[12] a carpenter sustained personal injuries aboard a partially completed vessel lying in navigable waters of the United States, for which he commenced against his employer a libel *in personam* in the admiralty for the recovery of damages for the employer's negligence. At the time there was in effect a State compensation law applicable to libellant's injury. Under that act, libellant was entitled to proceed against an Industrial Accident Fund. The case was before this Court upon questions of law certified by the Circuit Court of Appeals of the Ninth Circuit:

(1) Is there jurisdiction in admiralty because the alleged tort occurred on navigable waters? (2) Is libellant entitled, because of his injury, to proceed in admiralty against respondent for the damages suffered? This Court's conclusions were:

> "Construing the first question as meaning to inquire whether the general admiralty juris-

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[12]Grant Smith-Porter Co. v. Rohde, 257 U. S. 469.

diction extends to a proceeding to recover damages resulting from a tort committed on a vessel in process of construction when lying on navigable waters within a state, we answer, yes.

"Assuming that the second question presents the inquiry whether in the circumstances stated the exclusive features of the Oregon Workmen's Compensation Act would apply and abrogate the right to recover damages in an admiralty court which otherwise would exist, we also answer, yes."

Grant Smith-Porter Co. v. *Rohde,* 257 U. S. 469, 477-8.

It necessarily follows these conclusions that the admiralty jurisdiction may validly be diminished in those cases arising out of matters of mere local concern by the application of State workmen's compensation acts. If, as was found by the court below, the Constitution itself extends the judicial power of the United States to *all* admiralty cases, which power even the Congress is precluded from diminishing, a state could not validly require one in whose favor an admiralty cause of action arises to proceed exclusively in a state tribunal.

The doctrine of Grant-Smith-Porter Co. v. Rohde has been many times reaffirmed.[13] That a State may val-

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[13]It was expressly followed in **Miller's Underwriters** v. **Braud,** 270 U. S., 59, where it is said [p 65]:

"The Act (Compensation Act of the State of Texas) prescribes the only remedy; its exclusive features abrogate the right to resort to the admiralty court which otherwise would exist."

Alabama's Compensation Law was held the exclusive remedy

idly prescribe exclusive remedies in the nature of compensation acts to cases otherwise within the jurisdiction of the District Courts sitting in Admiralty, insofar as matters of mere local concern are involved, may fairly be said to be as well settled as any principle of the admiralty law. The only difficulties which have been encountered in following that case have been in relation to the question of, What are matters of mere local concern?

That the states are not without power to afford a remedy, exclusive in their courts, upon a maritime cause of action is further illustrated by *Red Cross Line* v. *Atlantic Fruit Company* (264 U. S. 109), where a statute of the State of New York authorized its courts to direct, upon application of a party to an agreement to arbitrate, that the arbitration proceed in the manner so provided. The agreement to arbitrate was in that case, contained in a charter party. It is there said:

> "By reason of the saving clause, state courts have jurisdiction *in personam,* concurrent with the admiralty courts, of all causes of action maritime in their nature arising under charter parties (citing the Judiciary Act of Sept. 24, 1789, c. 20, Sec. 9, 1 Stat. 73, 77, and other authorities). The 'right of a common law remedy,' so saved to suitors, does not, * * * include attempted changes by the States in the substantive admiralty law,

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for the widow of a lumber checker dying on navigable waters (Rosengrant v. Havard, 273 U. S. 664). Of the cases following Grant, Smith-Porter v. Rohde, are:

Sultan Ry. v. Dept. of Labor, 277 U. S. 136;

Alaska Packers Assn. v. Industrial Acc. Com. 276 U. S. 467.

> but it does include all means other than proceedings in admiralty which may be employed to enforce the right or to redress the injury involved. * * * A State may not provide a remedy *in rem* for any cause of action within the admiralty jurisdiction. (Citing authority). But otherwise, the State, having concurrent jurisdiction, is free to adopt such remedies, and to attach to them such incidents, as it sees fit."
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> *Red Cross Line* v. *Atlantic Fruit Co., supra,* pp 123, 4 (264 U. S. 109).

If, under the admiralty grant, the States may constitutionally afford remedies, exclusive in their courts, upon maritime causes of action, to that extent abrogating the power of the inferior Federal Courts to determine possible controversies arising out of the same facts, is it possible to soundly say that Congress itself could not, within those same provisions, provide that an administrative officer should determine the facts, leaving questions of law to the District Courts?

The argument advanced to sustain the conclusions of the lower courts manifestly overlooks that while the constitutional grant of judicial power is to *all* cases, *original* jurisdiction is not specified, as far as the inferior Federal Courts are concerned. If it be reasoned that the admiralty grant contemplated that the federal judicial power might or should embrace cognizance of all maritime causes of action whatsoever, within the admiralty and maritime jurisdiction as accepted in the United States, the language used is not such as to require that this jurisdiction should be exercised in the first instance in every such cause of action. To so require,

would be *contra* to the plain terms of the Constitution itself, it is thought, for manifestly the Constitution contemplated that the State courts should exercise concurrent jurisdiction over some of the cases to which the judicial power extends.[14]

An examination of the power of the Congress, delegated by the Constitution along lines other than the admiralty and maritime grant, seems to support clearly the power of the Congress in the latter field to vest the power of decision of matters of fact in an administrative officer, as is contended by us. By the identical terminology of the admiralty grant of judicial power, the Constitution provides that the same power shall extend "to all cases, in law and equity, arising under this Constitution, the laws of the United States, and Treaties made, or which shall be made, under their authority." The power of the Congress to vest in the State courts exclusive jurisdiction of certain "cases arising under the laws of the United States," as far as original jurisdiction is concerned, may not be doubted. The power to thus exclude from the inferior Federal courts jurisdiction in the first instance of those cases has often been exercised. Of the cases thus excluded, we find examples where prior thereto, under authority of the Congress the judicial power in the first instance of the inferior Federal courts had ex-

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14 "This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or laws of any State to the Contrary notwithstanding." Constitution Art. VI, paragraph two.

tended thereto, and had actually been exercised by those courts.

Extension of original jurisdiction to the inferior Federal courts over all suits at law or in equity, arising under the Constitution, Laws or Treaties of the United States, was not, broadly speaking, accomplished until 1875,[15] when Congress in express terms gave the Circuit Court original jurisdiction, concurrent with the courts of the States, of all suits of that nature, where the value of the matter in dispute was in excess of $500. By a later act,[16] the jurisdiction of the Circuit Courts was restricted by raising the required amount of the value in controversy to $2,000. When the Circuit Courts were discontinued, the jurisdiction was transferred to the District Courts, but the required amount of the value in controversy was raised to $3,000.[17] Can it be doubted that by the enactment of the Act of 1887 and of the Judicial Code, the inferior Federal Courts were thereby entirely deprived of original jurisdiction over cases arising under the Constitution and Laws of the United States, of which those courts were empowered to take cognizance by the Act of March 3, 1875? Yet the objection of the District Court in the case at bar, in so far as the admiralty-grant-question is concerned, is based solely and necessarily upon the theory that the Congress was without power to

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[15]Act of March 3, 1875, c. 137, Sec. 1, 18 Stat. 470.

Bankers Trust Co. v. Tex. & Pac. Ry., 241 U. S. 295, 305.

Tennessee v. Union and Planters' Bank, 152 U. S. 454, 459.

[16]Act of March 3, 1887, c. 373, Sec. 1, 24 Stat. 552.

[17]Judicial Code, Sec. 24.

deprive the inferior Federal Courts of jurisdiction of cases, where that jurisdiction had already been vested in those courts. If the Congress may rightfully withdraw original cognizance from the inferior Federal Courts of cases within the constitutional grant of judicial power, *a fortiori* that body may withdraw from the District Court determination of questions of fact, but leaving that court with complete power over questions of law!

A concrete example of the withdrawal by Congress of the original jurisdiction of the lower Federal Courts is found in the case of *Bankers Trust Co.* v. *Tex. & Pac. Ry.*, 241 U. S. 295. That was a suit, brought in the District Court, by a trustee against the Texas and Pacific Railway Company, a corporation, incorporated under an Act of Congress. The Railway Company moved to dismiss because of the Act of January 28, 1915 (c. 22, Sec. 5, 38 Stat. 583), providing that no court of the United States should have jurisdiction of any action or suit against any railroad upon the ground that it was incorporated under an Act of Congress. This court directly held (opinion pp 306, 7) that upon the enactment of the Act of March 3, 1875,[18] *supra* (extending the jurisdiction of the Circuit Courts to cases arising under the laws of the United States), jurisdiction was in the lower court, inasmuch as a suit against a corporation, incorporated under an Act of Congress, was a suit arising under the laws of the United States, but that court was without jurisdiction because of the passage of the Act of January 28, 1915, supra. The opinion (pages 306, 7) refers to another line

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[18]Act of March 3, 1875, c. 137, Sec. 1, 18 Stat. 470.

of cases[19] in which national banks were involved, as to which jurisdiction in the Circuit Court was also withdrawn by the Act of July 12, 1882, c. 290, Sec. 4 (22 Stat. 162), placing suits by and against national banks in the same category with suits by and against banks not organized under the laws of the United States.

It has been expressly held that the Judiciary Act of 1887-88 (Act of March 3, 1887, c. 373, 24 Stat. 552, Act of Aug. 13, 1888, c. 866, 25 Stat. 433) was intended to *contract* the jurisdiction of the Federal Courts.[20]

Another concrete example of the restriction of *original* jurisdiction in the lower Federal Courts may be had by reference to the Federal Employers' Liability Act of 1908 (c. 149, Sec. 1, 35 Stat. 65). By the amendment of April 5, 1910 (c. 143, Sec. 1, 36 Stat. 291), the Congress provided that no case arising under that act brought in a State Court, should be removed to a Federal Court. It may not be doubted that prior to 1910, cases arose under that act, brought in State Courts, which were removable under Judicial Code, section 28; and that, therefore, the amendment of 1910 restricted the District Courts of jurisdiction of those cases arising after the effective date of the amendment.

The doctrine is thus declared by this Court:

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[19]Leather Manufacturers' National Bank v. Cooper, 120 U. S. 778, 781.

Continental National Bank v. Buford, 191 U. S. 119, 122.

[20]Hanrick v. Hanrick, 153 U. S. 192;

Joy v. City of St. Louis, 122 Fed. 524, affirmed 201 U. S. 332.

"Only the jurisdiction of the Supreme Court is derived from the Constitution. Every other court created by the general government derives its jurisdiction wholly from the authority of Congress. That body may give, withhold or restrict such jurisdiction at its discretion, provided it be not extended beyond the boundaries fixed by the Constitution."

Kline v. *Burke Construction Company*, 260 U. S. 226, 234.

This expression was criticized by the District Court,[21] because so the argument ran, where the constitutional grant of judicial power extended to *all* cases, Congress was thereby prohibited from limiting that power. Nevertheless, the Constitution extends the judicial power to "all cases, in law and equity, arising under this Constitution, the Laws of the United States," as well as to "all cases of admiralty and maritime jurisdiction." *Bankers Trust Co.* v. *Texas & Pac. Ry.*, (241 U. S. 295), supra, was a case "arsing under the laws of the United States," and while this Court did not say in terms that the jurisdiction of the lower courts was from Congress, rather than directly from the Constitution, nevertheless the holding was directly and necessarily to that effect.[22] And we have not far to search before finding an early case," arising under the laws of the United

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[21] Farrell v. Waterman S. S. Co., 291 Federal 604, 605-610.

[22] The district court, concludes its opinion in Farrell v. Waterman S. S. Corporation, supra, (291 Federal 604, 612), thus:

"None of the cases I have examined, where the Supreme Court has said its jurisdiction was derived directly from the

States," wherein is used language which express the identical thought criticised in the *Burke* case:

> "As regards all courts of the United States inferior to this tribunal, two things are necessary to create jurisdiction, whether original or appellate. The Constitution must have given to the court the capacity to take it, and an act of Congress must have supplied it. Their concurrence is necessary to vest it."
>
> *The Mayor* v. *Cooper,* 6 Wallace 247, 252.

Much reliance is had by the District Court upon the great case of Martin v. Hunter's Lessees, 1 Wheat., 304 (*Farrell* v. *Waterman S. S. Co.,* 291 Fed. 605-609). This case is also cited by the Circuit Court of Appeals to the same end (R. 187). That case arose as a writ of error from the Court of Appeals of Virginia, founded upon the refusal of that court to obey the mandate of this Court requiring a former judgment to be carried into execution. The Virginia Court held that the appellate power of the Supreme Court of the United States did not extend to the State Court under the Constitution; that so much of the 25th section of the original Judiciary Act of 1789, extending the appellate jurisdiction of the Supreme Court to the State Court, was not pursuant to the Constitution; that the proceedings on said former writ of error in this court were therefore *coram non judice;* wherefore the Virginia Court was at liberty to decline this court's mandate. Thus the whole reasoning of this Court was to the

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Constitution, but that of the inferior courts was from the Congress, involved a case where the 'all' was used in the constitutional grant."

point that Congress was constitutionally empowered to vest appellate supervision of the highest court of a State in the Supreme Court of the United States. It is not within the province of this discussion to attempt to analyze the reasoning throughout the opinion.

It is sufficient to point out that that decision turned upon the constitutional exercise by the *Congress* of the power to extend the judicial power of the United States in an *original or appellate* form[23] to every "case" enumerated in the Constitution. We find nothing in that case, authorizing the position that the Constitution itself, upon

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[23]"The judicial power shall extend to all the cases enumerated in the Constitution: As the mode is not limited, it may extend to all such cases, in any form, in which judicial power may be exercised. It may, therefore, extend to them in shape of original or appellate jurisdiction, or both; for there is nothing in the nature of the cases which binds to the exercise of the one in preference to the other.

* * * * * *

"The judicial power is delegated by the Constitution in the most general terms, and may, therefore, be exercised by Congress under every variety of form, of appellate or original jurisdiction."

* * * * * *

"It must, therefore, be conceded that the Constitution not only contemplated, but meant to provide for cases within the scope of the judicial power of the United States, which might yet depend before State tribunals. It was foreseen that in the exercise of their ordinary jurisdiction, state courts would incidentally take cognizance of cases arising under the Constitution, the Laws, and Treaties of the United States. Yet to all these cases the judicial power, by the very terms of the Constitution is to extend. It cannot extend by original jurisdiction if that was already rightfully and exclusively attached in the State courts, which (as has been already shown) may occur; it must therefore extend by appellate jurisdiction, or not at all. It would seem to

the establishment of the lower courts, vests jurisdiction therein of all those "cases;" neither are the principles and reasoning of that case contrary to the authorities hereinbefore referred to. Upon the contrary, reasoning from *Martin* v. *Hunter's Lessees*, tends, we think, to support our position: The jurisdiction of this Court in that case was supported as a "case" arising under a "treaty made" (Constitution, Art. III, Sec. 2), under authority

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follow that the appellate power of the United States must, in such cases, extend to State tribunals; and if in such cases, there is no reason why it should not equally attach upon all others within the purview of the Constitution."

* * * * * *

"This power of removal is not to be found in express terms in any part of the Constitution; if it be given, it is only given by implication, as a power necessary and proper to carry into effect some express power. The power of removal is certainly not, in strictness of language; it presupposes an exercise of original jurisdiction to have attached elsewhere. The existence of this power of removal is familiar in courts acting according to the course of the common law in criminal as well as civil cases, and it is exercised before as well as after judgment. But this is always deemed in both cases an exercise of appellate, and not of original jurisdiction. If then the right of removal be included in the appellate jurisdiction, it is only because it is one mode of exercising that power, and as Congress is not limited by the Constitution to any particular mode, or time of exercising it, it may authorize a removal either before or after judgment." **Martin v. Hunter's Lessee**, 1 Wheat. 333, 338, 342, 349.

"In those cases in which original jurisdiction is given to the Supreme Court, the judicial power of the United States cannot be exercised in its appellate form. In every other case the power is to be exercised in its original or appellate form or both, as the wisdom of Congress may direct." **Osborn v. Bank**, 9 Wheaton, at page 820 (opinion by Chief Justice Marshall).

of the United States. That case, however, arose in a *State* Court, the judicial power of the United States not arising until *after* jurisdiction had been finally exercised by the highest State appellate tribunal. The Constitution itself extends the judicial power to "all cases" arising under a treaty in precisely the same terminology as it does to "all cases of admiralty and maritime jurisdiction." No valid distinction between the two classes of cases appears! Original jurisdiction was at that time exclusively vested in a State court in that case. If original jurisdiction may be vested in a *State Court* in a "case" arising under a treaty, upon what sound ground can it be said that Congress may not constitutionally invest an administrative officer with the power to originally determine facts in a "case" within the admiralty-and-maritime-jurisdiction grant, where the lower Federal Court is vested with exclusive original jurisdiction to determine all questions of law?

It is necessarily corrollary to the theory of the District Court, upon which its conclusion was based, that the jurisdiction of the lower Federal Courts in admiralty cases, was by the Constitution made *exclusive*. It says: "When exclusive jurisdiction is given by the Constitution, the Congress cannot limit or restrict this jurisdiction (*Farrell* v. *Waterman Steamship Co., supra,* 291 Federal 604, 612)." The Circuit Court of Appeals (R. 187) says: "The claimant's injury having been sustained while he was on a vessel afloat in navigable waters, where he then was for the purpose of rendering a maritime

service, the claim for compensation was within the admiralty jurisdiction, which jurisdiction is vested exclusively in constitutional Federal Courts, not in legislative courts or tribunals, or in any executive official." Both courts cite *Southern Pacific Co.* v. *Jensen* (244 U. S. 205), *Northern Coal & Dock Co.* v. *Strand* (278 U. S. 142), *Panama* v. *Vasquez* (271 U. S. 557), in support of these statements. But those cases did not turn upon the point that cognizance of maritime causes of action are exclusively vested, by the Constitution, in the lower Federal Courts.[24] Upon the contrary, it is settled that the State Courts have jurisdiction, concurrent with the District

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[24]These cases and those following turned upon the exclusion of the states by the Constitution from changing the substantive maritime law in its characteristic features, thereby destroying its uniformity and harmony in its international and interstate relations. The power of the Congress itself to legislate in the maritime field is expressly recognized:

> Under the admiralty grant in the Constitution "Congress has paramount power to fix and determine the maritime law which shall prevail throughout the country."
>
> "In the absence of controlling statutes, the general maritime law as accepted by the Federal Courts constitutes part of our national law applicable to matters within the admiralty and maritime jurisdiction."
>
> "The power of the States to change, modify or affect the general maritime law, while existing to some extent under the Constitution and the Judiciary Act of 1789, Sec. 9, Judicial Code, Secs. 24, 256, may not contravene the essential purposes of an Act of Congress, work material prejudice to the characteristic features of the general maritime law or interfere with the proper harmony and uniformity of that law in its international and interstate relations." **Southern Pacific**

Courts, sitting in admiralty, to enforce maritime causes of action, as long as the remedy used is a "common law remedy."[25] It is the substantive maritime law that cannot be changed or altered, in its interstate and international relations; neither can the State grant a remedy *in rem* (according to the course of admiralty proceedings.) But otherwise, as has been pointed out, even the States are free, absent congressional action. The word "exclusive" is not used in the constitutional grant, but in the Judiciary Act. The words "exclusive admiralty jurisdiction" as used by this Court, do not, in all instances, refer to exercise of jurisdiction by the lower Federal Courts, but to the authority of the general government to regulate the maritime law both as to enactment and

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v. Jensen, supra, p 206, 214-217. London Co. v. Industrial Commission (279 U. S. 109), Baisley Iron Works v. Span (281 U.S. 222), and Washington v. Dawson (264 U. S. 213), reaffirmed these doctrines.

But this line of cases are entirely in harmony with Grant, Smith-Porter Co. v. Rohde, supra, and cases following, where it is expressly recognized that while the national Government is vested with paramount and exclusive power over the general maritime law in its characteristic features, necessary to uniformity throughout the country, nevertheless, until Congress acts, the state may regulate matters of mere local concern.

[25] Messel v. Foundation Co., 274 U. S., 427, 432, 434, affirmed the right of a ship repairer injured on navigable waters to recover damages of his employer in an action under the Jones Merchant Marine Act in a State Court proceeding at Law. To the same effect are:

International Stevedore Co. v. Haverty, 272 U. S., 50.

Jamison et al, Executors, v. Encarnacion, 281 U. S., 635.

"A proceeding against the res on a maritime cause of action is

interpretation, exclusive in so far as the general outlines and features of that law are concerned, and paramount in other particulars.

The point of this discussion may be aptly summarised and conclusively determined in the language of this Court:

> "It must be admitted, that if the Constitution had ordained and established the inferior courts, and distributed to them their respective powers, they could not be restricted or divested by Congress. But as it has made no such distribution, one or two consequences must result,—either that each inferior court created by Congress must exercise all the judicial powers not given to the Supreme Court, or that Congress, having the power to establish the courts, must define their respective jurisdictions. The first of these infer-

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exclusively cognizable upon the admiralty side of the United States Courts."

The Moses Taylor, 4 Wallace, 411.

The Belfast, 7 Wallace, 624.

But the one in whose favor a maritime cause of action arises, is not limited to an action in rem. Wherever a maritime lien arises, the injured party may pursue his remedy, whether for a breach of maritime contract or for a marine tort, by a suit in rem, or by a suit in personam, at his election.

The Belfast, supra, 642.

And the in personam remedy may be pursued at law in the State Court or upon the law side of the United States Court, as well as on the admiralty side of the latter.

Steamboat Co. v. Chase, 16 Wallace, 522. 533.

ences has never been asserted, and could not be defended with any show of reason, and if not, the latter would seem to follow as a necessary consequence. And it would seem to follow, also, that, having a right to prescribe, Congress may withhold from any court of its creation jurisdiction of any of the enumerated controversies. Courts created by statute can have no jurisdiction but such as the statute confers. No one of them can assert a just claim to jurisdiction exclusively conferred on another, or withheld from all.

The Constitution has defined the limits of the judicial power of the United States, but has not prescribed how much of it shall be exercised by the circuit court; consequently, the statute which does prescribe the limits of their jurisdiction, cannot be in conflict with the Constitution, unless it confers powers not enumerated therein.

Such has been the doctrine held by this Court since first establishment. To enumerate all the cases in which it has been either directly advanced or tacitly assumed, would be tedious and unnecessary."

Sheldon v. *Sill*, 8 Howard 441, 448-9.

CONCLUSION

From the reasoning and authorities of the learned brief and argument, presented on behalf of the United States by the Solicitor-General, it clearly appears, we think, that had the question here presented arose in other fields of Congressional legislation, the question, respecting Congress' right to restrict issues of fact to administrative officers, and the law-making body having so pro-

vided by the Act under review, answers itself. If, as we have endeavored to make clear, Congress has equal power, within the admiralty grant, as in other fields, it seems to necessarily follow that under the Longshoreman's and Harbor Workers' Compensation Act there is no right of trial *de novo* in the District Court of issues of fact determined by the Deputy Commissioner.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1931

NO. 19

LETUS N. CROWELL, as Deputy Commissioner for the Seventh Compensation District of the United States Employees' Compensation Commission, PETITIONER

v.

CHARLES BENSON

NO. 20

LETUS N. CROWELL, as Deputy Commissioner for the Seventh Compensation District of the United States Employees' Compensation Commission; and J. B. KNUDSEN, Petitioners,

v.

CHARLES BENSON

On writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The opinion of the Circuit Court of Appeals for the Fifth Circuit (R. 185-190) is reported in 45 F. (2d) 66. The opinion of the District Court (R. 18-25) is reported in 33 F. (2d) 137, and a supplemental opinion of the District Court is reported in 38 F. (2d) 306.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

The Fifth Amendment, so far as pertinent provides:

> "No person shall * * be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use, without just compensation."

Article 3, Section 1 of the Constitution provides:

> "The judicial power of the United States shall be vested in one Supreme Court, and in such Inferior Courts as the Congress may from time to time ordain and establish. The judges, both of the Supreme and Inferior courts, shall hold their offices during good behavior and shall at stated times, receive for their services, a compensation which shall not be diminished during their continuance in office."

Article 3, Section 2, provides in part as follows:

> "The judicial power shall extend; to all cases of admiralty and maritime jurisdiction * * ."

The Longshoremen's and Harbor Workers' Compensation Act of Mar. 4, 1927, Chap. 509, provides in Section 2, 44 Stat. 1424, 33 U. S. C. A., Sec. 902, as follows:

> "The term 'injury' means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury, and includes an

injury caused by the willful act of a third person directed against an employee because of his employment.

The term 'employee' does not include a master or member of a crew of any vessel, nor any person engaged by the master to load or unload or repair any small vessel under eighteen tons net.

The term 'employer' means an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any dry dock.)

The term 'deputy commissioner' means the deputy commissioner having jurisdiction in respect of an injury or death."

Section 3 (33 U. S. C. A. Sec. 903) provides as follows:

"Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law. No compensation shall be payable in respect of the disability or death of—

(1) A master or member of a crew of any vessel, nor any person engaged by the master to load or unload or repair any small vessel under eighteen tons net; or

(2) An officer or employee of the United States or any agency thereof or of any State or foreign government, or of any political subdivision thereof.

(b) No compensation shall be payable if the injury was occasioned solely by the intoxi-

cation of the employee or by the willful intention of the employee to injure or kill himself or another. (Mar. 4, 1927, c. 509, Sec. 3, 44 Stat. 1426.)"

Section 4 (33 U. S. C. A. Sec. 904) provides in part as follows:

"(a) Every employer shall be liable for and shall secure the payment to his employee of the compensation payable under sections 907, 908 and 909 of this chapter. * * * "

Section 19 (33 U. S. C. A., Sec. 919) provides in part as follows:

"(a) Subject to the provisions of section 913 of this chapter a claim for compensation may be filed with the deputy commissioner in accordance with regulations prescribed by the commission at any time after the first seven days of disability following any injury, or at any time after death, and the deputy commissioner shall have full power and authority to hear and determine all questions in respect of such claim.

(b) Within ten days after such claim is filed the deputy commissioner, in accordance with regulations prescribed by the commission, shall notify the employer and any other person (other than the claimant), whom the deputy commissioner considers an interested party, that a claim has been filed. Such notice may be served personally upon the employer or other person, or sent to such employer or person by registered mail.

(c) The deputy commissioner shall make or cause to be made such investigations as he he considers necessary in respect to the claim, and upon application of any interested party shall order a hearing thereon. If a hearing on such claim is ordered the deputy commissioner

shall give the claimant and other interested parties at least ten days' notice of such hearing served personally upon the claimant and other interested parties or sent to such claimant and other interested parties by registered mail, and shall within twenty days after such hearing is had, by order, reject the claim or make an award in respect of the claim. If no hearing is ordered within twenty days after notice is given as provided in subdivision (b), the deputy commissioner shall, by order, reject the claim or make an award in respect of the claim.

(d) At such hearing the claimant and the employer may each present evidence in respect of such claim and may be represented by any person authorized in writing for such purpose."

Section 21 (33 U. S. C. A., Sec. 921) provides as follows:

"(a) A compensation order shall become effective when filed in the office of the deputy commissioner as provided in section 919 of this chapter, and, unless proceedings for the suspension or setting aside of such order are instituted as provided in subdivision (b) of this section, shall become final at the expiration of the thirtieth day thereafter.

(b) If not in accordance with law, a compensation order may be suspended or set aside, in whole or in part, through injunction proceedings, mandatory or otherwise, brought by any party in interest against the deputy commissioner making the order, and instituted in the Federal District Court for the judicial district in which the injury occurred (or in the Supreme Court of the District of Columbia if the injury occurred in the District). The orders, writs, and processes of the court in such proceedings may run, be served, and be returnable anywhere in the United States. The payment of the amounts

required by an award shall not be stayed pending final decision in any such proceeding unless upon application for an interlocutory injunction the court, on hearing, after not less than three days' notice to the parties in interest and the deputy commissioner, allows the stay of such payments, in whole or in part, where irreparable damage would otherwise ensue to the employer. The order of the court allowing any such stay shall contain a specific finding, based upon evidence submitted to the court and identified by reference thereto, that such irreparable damage would result to the employer, and specifying the nature of the damage.

(c) If any employer or his officers or agents fails to comply with a compensation order making an award, that has become final, any beneficiary of such award or the deputy commissioner making the order, may apply for the enforcement of the order to the Federal district court for the judicial district in which the injury occurred (or to the Supreme Court of the District of Columbia if the injury occurred in the District). If the court determines that the order was made and served in accordance with law, and that such employer or his officers or agents have failed to comply therewith, the court shall enforce obedience to the order by writ of injunction or by other proper process, mandatory or otherwise, to enjoin upon such person and his officers and agents compliance with the order.

(d) Proceedings for suspending, setting aside, or enforcing a compensation order, whether rejecting a claim or making an award, shall not be instituted otherwise than as provided in this section and section 918 of this chapter. (Mar. 4, 1927, c. 509, Sec. 21, 44 Stat. 1436)."

STATEMENT OF CASE.

On December 26, 1928, Letus N. Crowell, Deputy Commissioner for the seventh compensation district, purporting to act under the Act of Congress known as the "Longshoremen's and Harbor Workers' Compensation Act," entered an award in favor of J. B. Knudsen against Charles Benson. (Rec. p. 83-84). In the proceedings before the Deputy Commissioner, Benson had expressly denied that the relationship of employer and employee existed at the time of the claimant's injury (Rec. p. 6, Ex. B. to complaint, Rec. p. 94.) On January 24, 1929, Charles Benson filed a bill of complaint against Crowell and Knudsen seeking to enjoin the award on the ground that it was not in accordance with law, for the reason that Knudsen was not an employee of Benson at the time he was injured, so that the Deputy Commissioner had no jurisdiction to make the award (Rec-pages 1-8). Crowell and Knudsen separately filed a motion to dismiss the bill of complaint upon several grounds taking the point in effect, that the bill of complaint failed affirmatively to show that "there was no competent evidence before the Deputy Commissioner to support his order sought to be enjoined" (Rec. pages 12-16). The District Court overruled the motions, thereby holding merely that the bill of complaint was not legally insufficient on any of the grounds specified (Rec. page 26). The Court in its opinion, (Rec. pages 17-25), after expressing the view that the motions to dismiss should be overruled (Rec. p. 25), stated that "the Court will grant a hearing on the facts and the law, to ascertain if the proceedings before the Deputy Commissioner were in accordance with law". (Rec. p. 25).

The respondents then answered the complaint and made an issue of whether or not the claimant was employed by Benson in such wise as to bring him under the Longshoremen's and Harbor Workers' Compensation Act, and his claim for injuries suffered within the jurisdiction of the Deputy Commissioner (Rec. p. 27, Rec. p. 28). Thereafter, both respondents appeared, and without objection or exception (Rec. p. 28) entered upon a trial, at which the testimony of witnesses was offered in open Court. In fact, the respondents offered the oral testimony in open Court of the first two witnesses introduced. (Rec. pages 29-34). The record before the Deputy Commissioner was offered by respondents at the hearing before the District Judge and was admitted by the Court over complainant's objections, (Rec. p. 55) but was not read to the Court (Rec. p. 176).

There appears in the record of the Deputy Commissioner immediately before his so-called "Findings of Fact" (Rec. p. 7, Rec. p. 83), the following recital, viz:

> "Such investigation in respect to the above entitled claim having been made as is considered necessary, and a hearing having been held in conformity with law, the Deputy Commissioner makes the following:
>
> 'Findings of Fact'".

It thus appears that the Deputy Commissioner had made such investigation in respect to the claim as he "considered necessary", and in addition, held a hearing. It does not appear from the record what the investigation consisted of, nor what facts it dis-

closed, so that it affirmatively appeared that the record did not disclose all of the evidence or facts upon which the Commissioner acted, but only disclosed the testimony taken before him at the hearing.

The District Judge found under the evidence produced before him that Knudsen was not an employee of Benson at the time he was injured (Rec. p. 176) and consequently the Deputy Commissioner's award was not in accordance with law and was void for want of jurisdiction in said Deputy Commissioner to make such an award.

Assuming that petitioners, after entering upon the hearing before the District Judge on testimony taken de novo, without objection or exception on their part, are in position to question the decision of the District Judge, solely on the ground that the hearing should have been upon the record of the evidence taken before the Deputy Commissioner, there is involved in this case the nature and extent of the power of the Federal District Judges to review and correct awards made under the Longshoremen's and Harbor Workers' Compensation Act.

SUMMARY OF ARGUMENT.

I.

The ruling on the motions to dismiss the bill of complaint did not raise the question of whether the cause was triable de novo, or in admiralty, and petitioners entered upon a de novo trial in the District Court, offered evidence and took their chance of a favorable decision, without objection or exception to such procedure, and should not be heard to complain that the proceedings were irregular or erroneous

Comissioner of Rd. Imp. Dist. No. 2 v. St. Louis S. W. Ry. Co., 257 U. S., 547.
Reavis v. Fianza, 215 U. S., 16, 25.

II.

The only issue in fact tried and decided by the District Judge was whether or not the petitioner, Knudsen, was an employee of Benson. If he was not, the Deputy Commissioner had no power or jurisdiction to enter an award in his favor.

Ng Fung Ho v. White, 259 U. S., 276.
United States v. Grimley, 137 U. S., 147.
Crowell v. Benson, 45 Fed., (2d) 66.
Pine v. State Industrial Comm., 108 Okla., 185.
Borgnis v. Falk Co., 147 Wis., 327.
Courter v. Simpson Construction Co., 264 Ill., 488.
Hunter v. Colfax Consol. Coal Co., 175 Ia., 245.
Uphoff v. Industrial Board of Ill., 271 Ill., 312.
Hahnemann Hospital v. Industrial Board of Illinois, 282 Ill., 316.
Thede Bros. v. Industrial Commission, 285, Ill., 483.
Paul v. Industrial Commission, 288 Ill., 532.
Dorlon Bros. v. Industrial Acc. Comm. of Cal., 173 Cal., 250.
Roberts v. Industrial Acc. Comm., 52 Cal. App. 31.
Industrial Comm. of Utah v. Evans, 52 Utah, 394.

The jurisdiction of the Deputy Comissioner being special and limited, the District Court had the right to determine, on its independent judgment of the law and the evidence offered before it, whether jurisdiction to make the award existed, or whether the Deputy Commissioner acted beyond and without his jurisdiction. Fundamental and jurisdictional questions are always open to determination in the

courts, whether the order or decision be made by a court of special or limited jurisdiction, or by an administative board or body; the question of whether such a board or body acted within or beyond its jurisdiction, being always a judicial question.

Ng Fung Ho v. White, 259 U. S., 276.
United States v. Grimley, 137 U. S., 147.
Hawkins v. Bleakly, 243 U. S., 210, 215.
Kempe's Lessee v. Kennedy et al., 5 Cranch, 173, 185.
McClaughry v. Deming, 186 U. S., 49, 63.
Runkle v. United States, 122 U. S., 543, 555.
Givens v. Zerbst, 255 U. S., 11, 19.

III.

There has been some discussion as to whether a deputy commissioner is to be regarded as a judicial, or as an administrative officer, but it is clear to be seen from the statute, that his powers are wholly dependent upon the existence of the relation of employer and employee. When this relation exists he is authorized to consider the facts before him and to make an award. When this relation does not exist he has no power whatever. The question as to whether such an award is subject to review de novo upon matters other than the jurisdictional facts does not seem to us to be material, as it was the finding of the court in this case that the jurisdictional facts did not exist.

And again since it is provided by the Constitution that no citizen shall be deprived of life, liberty and property without due process of law, what difference does it make under what classification we may place the commissioner? Surely it matters not from what source authority may be obtained or

what powers Congress may attempt to confer upon him, he can never be so empowered as to enable him to condemn a citizen to liability to another, by any proceedings which may be beyond the limits of his jurisdiction and this propositon is accentuated when it appears, as in this case, that the order has not been based entirely upon the evidence produced at a hearing, but has been based, at least in part, upon the information obtained by him from other sources.

The necessary result of the filing of the compensation order making an award, is to cast upon the court the duty to determine whether the order was made and served in accordance with law or not. And to enforce obedience if the order was made in accordance with the law. Act of March 4, 1927, c. 509, Sec. 21, 44 Stat. 1436, 33 U. S. C. A. Sec. 921.

This provision applies whether the order is made without a hearing or is based upon the evidence produced at a hearing, and whether the commissioner does or does not report the evidence to the court. The result is that unless the court may make independent inquiry as to the jurisdictional fact of employment, the order of the comissioner may subject the property of the alleged employer, to execution, based upon some private misinformation, the nature or extent of which can not be learned, and his conclusion cannot be reviewed in any court of justice. To illustrate, let us observe that the report or finding upon which the award is based, the enforcement of which is enjoined in this case does not disclose to what extent, if at all, the commissioner's conclusion that the jurisdictional fact of employment existed, was based upon the evidence offered at the hearing, of which he preserved a rec-

ord. On the contrary, it indicates that the report was based, in whole or in part, on private investigations made by the commissioner, the nature, extent and result of which are not revealed in the report or finding (Rec. p. 7). Attention is called to the fact that while Subdivision (b) of Sec. 23 of the Act requires the commissioner to preserve a record of his proceedings at any hearing, he is not required to make any record or report of such other investigations as he may, and did in this case, make and upon which he, in part, based his findings as shown by his report.

It is, therefore, respectfully submitted:

That to limit the court, in its review of the jurisdictional facts, to a consideration of the evidence offered before the Commissioner, at the hearing, would not only violate the rule, that the finding of jurisdictional facts by a court or board of limited jurisdiction is always open to collateral attack, but it would make it impossible for the court to consider the question of jurisdiction at all, since the commissioner was not required to and did not reveal in his report either the nature or result of the private inquiries upon which he relied in part or in whole for his finding, so that such findings as he made could not be reviewed except upon a proceedings **de novo.**

IV.

There is no express provision in the act for an appeal only on questions of law or that the Deputy Commissioner's finding of facts shall be conclusive if supported by any substantial evidence. The method of review provided is in a court ordinarily of

original jurisdiction only, and the proceeding prescribed is original in character. There is no provision in regard to how the proceedings in the District Court shall be heard, nor as to what papers shall be filed or what testimony given. There is no provision that the proceedings shall be upon a transcript of the proceedings before the commissioner or for bringing up a record by bill of exceptions. Every consideration exists in this case that influenced the court to hold in the case of Liu Hop Fong v. United States, 209 U. S., 453, 461-2, that a Chinaman appealing to the District Court from the judgment or order of a United States Commissioner in cases arising under the Chinese Exclusion Law, is entitled to a trial **de novo.**

The case is one within the admiralty and maritime jurisdiction, and even on appeal in such cases unless Congress has clearly indicated the contrary, the trial is **de novo** both on the law and the facts.

The expression "not in accordance with law" is equivocal and should not be so construed as to take away jurisdiction of admiralty cases of this character expressly and clearly conferred on the federal courts.

The act if construed to accord a hearing **de novo** in the District Court, will not materially affect a speedy hearing in most cases, and if it did, justice should not be sacrificed to speed, nor should the clear jurisdiction conferred on district courts be withdrawn by implication from an argument of convenience.

The fact that while the act is modelled on the New York Act, it omits the provisions of that act,

making the finding of the Commissioner final on all questions of fact and providing for the certifying only of questions of law, is strongly indicative that Congress never intended an appeal only on questions of law.

Conceding the power of Congress, a party should not be deprived of the security of a judicial hearing heretofore plainly provided for, unless that result is made necessary by clear and unmistakable language which is not the case with the Longshoremens' and Harbor Workers' Compensation Act.

V.

The case or controversy now involved is a case or controversy under a new system of admiralty or maritime rules, and the application of those rules to a past state of facts, so as to determine liability vel non as between a contesting employer and employee, involves the exercise of the judicial power of the federal government, which under Article 3, sections 1 and 2 of the Constitution can only be exercised by a constitutional court created under said Article of the Constitution.

Ex parte Bakelight Corporation, 279 U. S., 438.

American Insurance Co. v. Carter, 1 Peters, 511, 546.

Den v. Hoboken Land & Imp. Co., 18 How., 272.

Kansas v. Colorado, 206 U. S., 46.

Any attempt by the Congress to confer this judicial power or jurisdiction on any federal administrative officer, board or legislative court would violate said Article 3, sections 1 and 2 of the Constitution, and likewise would violate the due process clause of the Fifth Amendment, because it is not

the process provided for such cases by the Constitution.

Martin v. Hunter's Lessee, 1 Wheaton, 304.
Ng Fung Ho v. White, 259 U. S., 276.

To say the least of it, to construe the act under consideration as contended for by petitioners would raise a grave question as to its constitutionality which should always be avoided, if possible.

United States v. Jim Fuey May, 241 U. S., 394, 401.
United States v. La Franca, 282 U. S., 568.
Russian Vodunteer Fleet v. United States, 282 U. S., 481.

ARGUMENT

I.

THERE BEING NO OBJECTION OR EXCEPTION TO THE TRIAL COURT'S HEARING THE CASE DE NOVO, NOR TO HIS TRANSFERRING IT TO THE ADMIRALTY DOCKET, THE QUESTIONS RELIED ON AS ERROR WERE NOT RAISED.

There are only two specifications of error upon this record.

1. That the court erred in holding that there was a right of trial de novo in the District Court, and that the act was unconstitutional unless there was that right.

2. That the court erred in holding that the injunction proceedings authorized by the act should be heard in admiralty rather than in equity.

The Act itself (Sec. 21 (b), 44 Stat. 1424; 33 U. S. C. A. Sec. 921) provides that:

"If not in accordance with law a compensation order may be suspended or set aside in

whole or in part through injunction proceedings mandatory or otherwise, brought by any party in interest against a deputy commissioner making the order and instituted in the Federal District Court, of the judicial district in which the injury occurs."

It is indisputable, therefore, that the jurisdiction to suspend or enjoin enforcement of this order of award is vested in the United States District Court, and that the parties submitted this cause for decision to that court, and that that court rendered a decree therein. The mere fact that the jurisdiction of the District Court extends to various subject matters some of which are matters in equity and some of which are matters in admiralty, does not seem to us to affect the identity of the court in any way, or to make it material to the validity of the decree whether the proceedings are referred to as in equity or in admiralty. The question as to whether the litigation is in equity or in admiralty, depends upon the nature of the subject matter and not upon the name by which it is referred to by the parties, and in either event the jurisdiction of the court to decree is the same. The decree was a decree of the District Court of the United States which was required to determine the matter. Upon what docket the case was entered for trial was a question which affected only the convenience of the court.

The first assignment is to the holding of the Court of Appeals that there was a right of trial de novo in the District Court, and that the Act was unconstitutional unless there was that right. The decree, however, did not hold that there was a right of trial de novo in the District Court, or that the Act

was unconstitutional unless that right was accorded. It consisted of four paragraphs which adjudge:

1. That the claimant was not an employee of the complainant who is the alleged employer.

2. That the report was not in accordance with the law.

3. That the injunction should issue against its enforcement.

4. That the claim was thereby rejected and dismissed.

This decree adjudicated only one fact, namely, that the proceedings before the commissioner were not in accordance with the law for the reason that the claimant was not an employee of the alleged employer, who was the complainant, and that for this reason the commissioner had no jurisdiction in the matter, and the award was not, therefore, made in accordance with the law.

We respectfully submit that the question sought to be presented by the first assignment was not raised by any objection or exception in the trial court. The respondents filed a motion to dismiss the bill of complaint upon several grounds, the substance of all of these grounds being that the bill of complaint should have set out the testimony before the Deputy Commissioner, so that the Court could determine from this testimony whether the award of the Deputy Commissioner was in fact contrary to law. The complaint complied with Equity Rule 25, in that it contains "a short and simple statement of the ultimate facts upon which the plaintiff asks relief, omitting any mere statement of evidence." At any event, the ruling on the motion

to dismiss did not involve the question now sought to be presented to this court under the first assignment. It only involved the question of the sufficiency of the bill of complaint as a matter of pleading. While it is true that the District Judge in his opinion, which was handed down preliminary to the ruling on the motion to dismiss, did express the view that the complainant was entitled to a trial **de novo**, the fact remains that the ruling on the pleadings did not involve this question and the further fact is that respondents did not thereafter raise the question by any objection or exception to the hearing of the evidence **de novo** (Rec. p. 28). On the contrary, it appears that without either objection or exception, they entered upon a trial **de novo** before the District Judge, and themselves offered the first two witnesses that were produced at this hearing. (Rec. p. 29-34). And as pointed out, the decree involved merely a holding that the order of the deputy commissioner was without his jurisdiction, for the reason that the claimant was not an employee.

We submit that having entered upon the trial of this case on testimony taken **de novo** before the District Judge without either objection or exception, and having taken the chance of a favorable decision from the District Judge on testimony so produced, the petitioners were not and are not entitled to have reviewed the question of the right of the complainant to a trial **de novo**. The situation is exactly similar to that which existed in the case of Commissioners of Road Improvement District No. 2 v. St. Louis, S. W. Ry Co., 257 U. S., 547, where it was held that error could not be predicated on the action of the District Court in withdrawing a case

from the jury and making findings without objection or exception by the parties.

And in principle the situation is the same that is involved in the many cases which hold that one who submits to a trial, without objection or exception cannot, on appeal, complain that such proceedings were irregular or erroneous.

Reavis v. Fianza, 215 U. S., 16, 25.
Wood v. Wilbert, 226 U. S., 384, 386.
Burbank v. Bigelow, 154 U. S., 558.
Perego v. Dodge, 163 U. S., 160.
Brown Bonnell & Co., v. The Lake Superior Iron Co., 134 U. S., 530.
Reynes v. Dumont, 130 U. S., 354.
Kilbourn v. Sunderland, 130 U. S., 505.
Louisville and Nashville R. R. Co. v. Cook Brewing Co., 223 U. S., 70, 81.

The second assignment relates only to the side of the docket upon which the case was entered, and there was likewise no objection or exception raising this question. Furthermore, we submit that the subject matter is in admiralty, but that the name by which the proceedings may be called is of no importance.

II.

THE DISTRICT COURT HAD THE RIGHT TO DETERMINE FOR ITSELF THE JURISDICTIONAL QUESTION OF WHETHER THE RELATION OF EMPLOYER AND EMPLOYEE EXISTED.

The decision of the District Court which was affirmed on appeal was predicated solely on the finding by the Court that the petitioner, Knudsen, was not an employee of Benson at the time of the in-

juries complained of. This was an issue before the Deputy Commissioner and necessarily involved his jurisdiction to make an award under the Longshoremen's and Harbor Workers' Compensation Act.

Nogueira v. New York, N. H. and H. R. Co., 281 U. S., 128.
Crowell v. Benson, 45 Fed. (2nd) 66.
Pine v. State Industrial Comm., 108 Okla. 185.
Borgnis v. Falk Co., 147 Wis., 327.
Courter v. Simpson Construction Co., 264 Ill., 488.
Hunter v. Colfax Consol. Coal Co., 175 Ia., 245.
Uphoff v. Industrial Board of Ill., 271 Ill., 312.
Hahnemann Hospital v. Industrial Board of Illinois, 282 Ill., 316.
Thede Bros. v. Industrial Commission, 285 Ill., 483.
Paul v. Industrial Commission, 288 Ill., 532.
Dorlon Bros. v. Industrial Acc. Comm. of Cal., 173 Cal., 250.
Roberts v. Industrial Acc. Comm., 52 Cal. App., 31.
Industrial Comm. of Utah v. Evans, 52 Utah, 394.

In view of the fact that the District Court found that the relationship of employer and employee did not exist and, therefore, that the Deputy Commissioner was without jurisdiction to make any award, the only question directly and necessarily involved in this case is whether the District Court could properly hear evidence on this jurisdictional fact and determine its existence **vel non** according to his independent judgment, or whether he must accord to the Deputy Commissioner's finding (if finding there was) conclusive effect, if there was any "substantial" evidence to support it.

Assuming for the purposes of the present discussion that under the act in question, the Deputy Commissioner acts only in an administrative capacity, we respectfully maintain that the District Court had jurisdiction and authority to determine, on its own independent judgment and upon evidence produced before and heard by it, the question of whether this jurisdictional prerequisite in fact existed.

Even in those states where it is held that the commissioner or commission acts merely in an administrative capacity, it is affirmatively held that the act would violate a constitutional provision vesting judicial power in the courts of the state, if the act should be construed as taking away from the courts the power to determine for themselves whether jurisdiction in fact existed.

Borgnis v. Falk Co., 147 Wis., 327.
Hunter v. Colfax Consol. Coal Co., 175 Ia., 245.

The Deputy Commissioner, having only a limited and special jurisdiction, his finding that he had jurisdiction is not binding on the District Court when it comes to review the question of whether as a matter of fact he did have jurisdiction. The bill of complaint in this case expressly alleges facts which show that the Deputy Commissioner did not have jurisdiction of this case, because according to those allegations, Knudsen was not an employee so as to bring him within the benefits of the Statute. Unless he was such an employee, then the Deputy Commissioner had no jurisdiction to enter an award, and on review, whatever may be true of other matters, the District Court had the right to detemine

for itself whether the Deputy Commissioner in fact had jurisdiction. This necessitated an inquiry into the facts in regard to the nature of the employment of Knudsen at the time he was injured. As to such facts, the District Court on review was not bound by the findings of the Commissioner, but could re-examine the facts and the law and determine for itself whether the Deputy Commissioner had jurisdiction to act.

In this case the court has only undertaken to determine for itself the jurisdictional question of whether the claimant was an employee of respondent engaged in a maritime employment or service at the time he was injured aboard a vessel on navigable waters.

The exact situation in principle existed in the case of Ng Fung Ho. v. White, 259 U. S., 276. One admittedly an alien or not claiming to be a citizen was subject to deportation on executive order. But it was nevertheless held that where he made a bona fide claim of citizenship which he supported by evidence, he was entitled to have the jurisdictional question of citizenship vel non tried de novo before the court and upon its independent judgment.. Mr. Justice Brandeis, in that case says very pertinently:

> "Here the proceeding is throughout executive in its nature.
>
> Jurisdiction in the executive to order deportation exists only if the person arrested is an alien. The claim of citizenship is thus a denial of an essential jurisdictional fact. The situation bears some resemblance to that which arises where one against whom proceedings are being taken under the military law denies that he is in the military service. It is well settled

that in such a case a writ of habeas corpus will issue to determine the status. * * If the jurisdiction of the Department of Labor may not be tested in the courts by means of the writ of habeas corpus, when the prisoner claims citizenship and makes a showing that his claim is not frivolous, then obviously deportation of a resident may follow upon a purely executive order, whatever his race or place of birth; for, where there is jurisdiction, a finding of fact by the executive department is conclusive * * .

To deport one who so claims to be a citizen obviously deprives him of liberty, as was pointed out in Chin Yow v. United States, 208 U. S., 8, 13, 28 Sup. Ct. 201, 52 L. Ed., 369. It may result also in loss of both property and life, or of all that makes life worth living. Against the danger of such deprivation without the sanction afforded by judicial proceedings, the Fifth Amendment affords protection in its guarantee of due process of law. The difference in security of judicial over administrative action has been adverted to by this court. Compare United States v. Woo Jan, 245 U. S., 552, 556, 38 Sup. Ct. 207, 62 L. Ed., 466; White v. Chin Fong, 253 U. S. 90, 93, 40 Sup. Ct. 449, 64 L. Ed., 797".

Now the jurisdiction to entertain the claim at bar under the instant Act of Congress depends upon the question of whether the relationship of employer and employee existed at the time of Knudsen's injury—the existence of that jurisdictional requisite is denied by Benson, who asserts that Knudsen did not stand in the relation of employee—surely then Benson, a citizen, ought not be deprived of his property without a trial of the facts involving that jurisdictional question by the agency appointed by the Constitution—a trial de novo and attended, as the Supreme Court says, with the security afforded

by judicial proceedings. We submit that the case of Ng Fung Ho is conclusive of the right to a trial de novo on the issue of employment vel non, which was the only question passed upon by the trial court.

Similarly on the question of enlistment so as to confer jurisdiction on a court-martial, the jurisdictional fact of enlistment vel non is open to review in the civil courts, which act upon the evidence before them and upon their independent judgment of the facts and the law.

United States v. Grimley, 137 U. S., 147; 34 L. Ed., 636.

Ex parte Dostal, 243 Fed., 664, 668-9.

And a civil court may determine on habeas corpus whether an individual "was a person serving with the armies of the United States in the field," so as to be "subject to military law" and to trial by Court-martial.

Ex parte Falls, 251 Fed., 415.

And whether an individual was in fact an alien and so illegally certified by selective draft local and district boards to be in the military service and subject to Court-martial, is a question of jurisdiction and of fact open to the civil courts on habeas corpus.

Ex parte Beck, 245 Fed., 967, 969.

And likewise the courts in extradition proceedings, may ascertain upon evidence introduced on application for a writ of habeas corpus whether the individual is the identical person charged as a fugitive from justice, and generally whether he is a fugitive from justice and so subject to extradition and this in spite of the fact that the Governor of the State has satisfied himself that the issuance of the extradition warrant is proper.

Ex parte Chung Kin Tow, 218 Fed., 185.
Robb v. Connolly, 111 U. S., 624; 28 L. Ed., 542.
Hyatt v. Corkran, 188 U. S., 691.
McNichols v. Pease, 207 U. S., 100.

In Borgnis v. Falk Co., 147 Wis., 329, the court in speaking of a State Industrial Commission administering the State Workmen's Compensation Act said:

> "The decision of such a board may be made conclusive when the board is acting within its jurisdiction, not otherwise. Hence the question of its jurisdiction is one always open to the courts for review. It cannot itself conclusively settle that question, and thus endow itself with power. * * *
>
> The Industrial Commission must, of course, decide these questions in any case where they are raised; but it cannot decide them conclusively, for they are jurisdictional questions on which its right to act at all depends. They must be open to review in some court of competent jurisdiction; otherwise, the parties would be denied due process of law. The tribunal only has authority over those who have voulntarily elected to give it authority, and if it can decide finally that a man has given consent, when he has not, it assumes the functions of a court.
>
> If the act before us took away from the courts the power to consider these jurisdictional questions, either expressly or by necessary implication, the contention that judicial power had been vested in the commission, contrary to the command of the Constitution, would be of greater force; but we think that the act does not do this, or attempt to do it. True, it says that the findings of fact made by the commission shall, in the absence of fraud be conclusive; but it provides for an action in the circuit court of

Dane county, in which the board's award may be set aside upon either of three grounds, viz.: (1) That the board acted without or in excess of its powers; (2) that the award was procured by fraud; and (3) that the findings of fact do not support the award. * * *

We regard the expression 'without or in excess of its powers' as substantially the equivalent, or at least as inclusive of the expression 'without or in excess of its jurisdiction,' as those words are used in certiorari actions to review the decisions of administrative officers and bodies. We know of no other construction that can be logically given to them, and it seems to us that they were designedly and advisedly inserted by the framers of the bill to meet the very objection which is now made. With this construction, it is certain that the constitutional powers of the courts have not been invaded, and that no man without his consent can be brought under the law or is deprived of his right to 'due process of law' thereby."

In Hawkins v. Bleakly, 243 U. S., 210, 215, the court was called upon to determine whether the procedure under the Iowa compensation act was due process. Under that act in case of disagreement between employer and employee, the Industrial Commissioner called for the formation of an arbitration committee of three. This committee made such inquiries and investigations as it deemed necessary and reported to the Industrial Committee. In the event a review is claimed, the commissioner hears the evidence and makes the decision which may be presented to the county court which shall render a decree thereon as if in a suit heard and determined by the court. There is an express provision that there shall be no appeal on a question of fact,

but the Supreme Court of Iowa held in the case of Hunter v. Colfax Colsolidated Coal Co., 175 Ia., 245:

> "Appeal is provided from the decree enforcing the award on which all save pure questions of fact may be reviewed . . . We hold that though the act does not in terms provide for judicial review, except by said appeal, the statute does not take from the court all jurisdiction in the premises . . . We are in no doubt that the very structure of the law of the land, and the inherent power of the courts, would enable them to interfere, if what we have defined to be the jurisdiction conferred upon the arbitation committee were by it exceeded—**could inquire whether the act was being enforced against one who had rejected it, whether the claiming employe was an employe**, whether he was injured at all, whether his injury was one arising out of such employment, whether it was due to intoxication of the servant, or self-inflicted or, acceptance being conceded, into whether an award different from the statute schedules had been made, into whether the award were tainted with fraud on part of the prevailing party, or of the arbitration committee, and into whether that body attempted judicial functions, in violation of or not granted by the act." (Italics ours).

This court in Hawkins v. Bleakly, supra, after quoting the above portion of said opinion, said:

> "Thus it will be seen that the act prescribes the measure of compensation and the circumstances under which it is to be made, and establishes, administrative machinery for applying the statutory measure to the facts of each particular case; provides for a hearing before an administrative tribunal, and for judicial re-

view upon all fundamental and jurisdictional questions".

And among the "fundamental and jurisdictional questions" open for judicial review under the act as construed by the Iowa Supreme Court is the inquiry "whether the claiming employe was an employe."

In the case of Courter v. Simpson Construction Co., 264 Ill., 488; the Supreme Court of Illinois in passing upon the question of whether the parties to an award under the Workmen's Compensation Act of Illinois, were entitled to have a review of the decisions of the industrial board by a court, said:

> "It seems clear that the Legislature would have no power to deprive the parties of the right to have a court review the action of the board to the extent of determining whether the board had acted illegally or without jurisdiction. To deny a court review of those questions would violate the due process of law provision of the Constitution. * * * * The industrial board has no jurisdiction to apply the act to persons or corporations who are not subject to its provisions nor to an accident not within the provisions of the act. If it did so it would not be 'acting within its powers,' and it would seem essential that there must be some remedy for a review by some proper court of the question whether the board acted within its powers."

In Uphoff v. Industrial Board of Illinois, 271 Ill., 312, the question was whether a particular employee came within the provisions of the compensation act and, therefore, whether the industrial board had jurisdiction to enter an award. The Court said:

"Counsel for defendant in error Bruner contends that the decision of the Industrial Board under this statute is decisive of this question and cannot be inquired into by the courts. This contention cannot be supported. The decision of the Industrial Board is only binding when it is acting within its powers. This court said in Courter v. Simpson Construction Co., 264 Ill. 488, 106 N. E. 350, that 'the Industrial Board has no jurisdiction to apply the act to persons or corporations who are not subject to its provisions, nor to an accident not within the provisions of the act,' and that if it did so the remedy was in the courts."

In Industrial Commission of Utah v. Evans, 52 Utah 394, the court said:

"It is contended, however, that the commission must decide whether it has jurisdiction or not in a given case, and that its decision is final. This presents the very crux of the question.

The statute, as we have seen, does not in express terms invest the commission with such a power. The statute merely says that the commission has jurisdiction respecting the questions 'pertaining to the payment of compensation and benefits, and its decisions thereon shall be final.' This language, neither in express terms nor by necessary implication, confers exclusive power upon the commission to determine the ultimate questions of whether in a given case either the employer or the employe comes within the act. In the statute it is apparently assumed that both the claimant and the employer come within the act. If that fact is conceded or not disputed, nothing remains, as a matter of course, save to determine the character and extent of the injury and to fix the amount of compensation and the terms and conditions of payment, and matters pertaining thereto, as provided in

the act. Where, however, as here, the right of the commission to proceed under the act is challenged at the very threshold of the proceeding to allow compensation upon the ground that the injury is not one provided for by the act—nay, more, that it is one which is expressly excluded therefrom—the question is quite different. Where such a condition exists we find nothing in the act which prevents the right of any employer from assailing the decision of the commission respecting ultimate liability. In other words, we find nothing in the act which authorizes the commission to deplete the insurance fund by devoting it to claims not covered by the act or to require employers or insurance carriers to pay any such claims. Nor do we find anything in the act which authorizes the commission to determine without right of review the question of ultimate liability under the act. To do that clearly is a judicial question, and when it arises, as in this case, the right to an adjudication by the courts cannot be denied."

That the question of whether a claimant under the Longshoremen's and Harbor Workers' Compensation Act is an employee of the kind specified in the act is jurisdictional seems clear both on reason and authority, and that whether this jurisdictional fact exists in a given case is a matter open to decision in the courts upon their independent judgment, both of the law and the facts, is held in the following additional cases:

Pine v. State Industrial Comm., 108 Okla. 185.

Hahnemann Hospital v. Industrial Board of Ill., 282 Ill., 316.

Thede Bros. v. Industrial Commission, 285 Ill., 483.

Paul v. Industrial Commission, 288 Ill., 532.

Dorlon Bros. v. Industrial Acc. Comm. of Cal., 173 Cal., 250.

Roberts v. Industrial Acc. Comm., 52 Cal. App., 31.

The rule permitting such a review is but an application of the general rule that when the sovereign power attaches conditions to the exercise of a sovereign right, the inquiry whether the conditions have been observed is a proper matter for judicial cognizance".

Miss. & R. River B. Co. v. W. C. Patterson, 98 U. S., 403.

Commrs. of Road Imp. Dist. No. 2 v. St. Louis S. W. Ry. Co., 257 U. S., 547.

The brief of the Solicitor General in effect concedes the right and power of the district court to determine for itself whether the Deputy Commissioner had jurisdiction, but assumes that the question of employment vel non is not a jurisdictional question. (Solicitor General's Brief, p. 12, 38-39) Conceding that the status of citizenship vel non raised a jurisdictional question in Ng Fung Ho v. White, 259 U. S., 276, the Solicitor General assumes that the status of employer and employee is not essential to the jurisdiction of the Deputy Commissioner. In the one case if the status of citizenship existed there was no jurisdiction. In the other, if the status of employee did not exist there was no jurisdiction. The Deputy Commissioner had no power or jurisdiction to act unless claimant was an employee of the kind specified in the Longshoremens' and Harborworkers' Compensation Act. That the existence of this status was jurisdictional is manifest from the terms of the act itself as well as from the authorities herein cited.

We respectfully submit, therefore, that the District Court, in any event, properly passed on the jurisdictional question of employment vel non according to its own independent judgment.

III.

TO DENY TO THE UNITED STATES DISTRICT COURTS THE POWER TO DETERMINE DE NOVO THE FACTS UPON WHICH THE JURISDICTION OF THE COMMISSIONER DEPENDS WOULD BE TO SUBJECT THE APPELLANT TO LIABILITY WITHOUT DUE PROCESS OF LAW.

It is provided by subdivision (c) of Section 19 of the act of March 4, 1927, 44 Stat. 1424 (33 U. S. C. A., Sec. 919 (c)) that:

> "The deputy commissioner shall make or cause to be made such investigations as he considers necessary in respect to the claim, and upon application of any interested party shall order a hearing thereon. If a hearing on such claim is ordered the deputy commissioner shall give the claimant and other interested parties at least ten days' notice of such hearing served personally upon the claimant and other interested parties * * * If no hearing is ordered within twenty days after notice is given as provided in subdivision (b), the deputy commissioner shall, by order, reject the claim or make an award in respect of the claim."

It is provided by subdivision (a) of Section 23 that:

> "In making an investigation or inquiry or conducting a hearing the deputy commissioner shall not be bound by common law or statutory rules of evidence or by technical or formal rules

of procedure, except as provided by this chapter; but may make such investigation or inquiry or conduct such hearing in such manner as to best ascertain the rights of the parties."

As we understand these provisions, it is made the duty or at least the privilege of the commissioner to make an award against an employer, based upon any information that he may obtain either in person or through a representative, in any manner whatsoever, wholly regardless of whether the source of information would be admissible in evidence against the employer or not, unless a hearing has been demanded, but if a hearing is demanded, then that the award must be based upon the evidence adduced at the hearing, at which the employer may be present and participate. If this be the proper construction of the language of the Statute, then it is, of course, perfectly clear that where a hearing is demanded, the award must be based upon evidence produced at that hearing. To provide for a hearing, and at the same time to authorize the commissioner to make an award based upon the result of his inqury, made either before or after the hearing, or upon any other matters not presented at the hearing, would convert the hearing into a farce; and would wholly deprive the employer of the benefit of the hearing provided for by the Statute. But it seems to have been the conception of the commissioner, that the hearing provided for by the Statute, was intended as merely an empty formality which would be fully satisfied if the hearing was granted, even though the award was predicated upon inquiries made either before or after the hearing in the absence of the employer, without any opportunity whatsoever on his part to inquire in regard thereto. When we inquire whether

the award was predicated upon the evidence adduced at the hearing, or upon the information obtained by the commissioner from other sources, and at other times, we find that the only information upon this subject afforded by the report of the commissioner must be obtained from the following recitation: (Rec. p. 83).

> "Such investigation in respect to the above entitled claim, having been made as is considered necessary, and a hearing having been held in conformity with law, the deputy commissioner makes the following: Finding of Facts."

Here follows the so-called Findings of Fact, which does not set forth the facts upon which the conclusion of employment was based, but merely states the conclusion therefrom that "the claimant above named was in the employ of the employer above named" etc.

As will be readily observed, it is impossible to ascertain from this award, to what extent it was based upon the investigation made by the commissioner prior to the hearing, and to what extent, if at all, it was based upon his conclusions from the evidence adduced at the hearing. The question, therefore, arises whether an award based in whole or in part upon an ex parte investigation conducted by the commissioner in the absence of the employer, and based upon unknown sources of information, whether mere rumors or any other class of incompetent evidence upon which the commissioner is pleased to rely, can be regarded as having been made in accordance with the law, so as to exclude the operation of subdivision b of Section 21, which authorizes the court to suspend or set the same aside

in whole or in part, through an injunction proceedings, or as to preclude the inquiry by the courts **de novo** as to the existence of the jurisdictional fact of employment upon which the whole power and jurisdiction of the commissioner rests. If it be true that the commissioner may render an award against the employer based in whole or in part upon private inquiry, or that the commissioner may proceed to make an award, as in this case, based in part upon his investigation before the hearing, as to which the employer is offered no opportunity of being heard or even so much as learning what it is that the commissioner relied upon, and the court may not inquire as to the existence of the jurisdictional fact of employment, as to which the commissioner's conclusion is predicated upon matters that are not shown by his report, or by any of the records of the proceedings before him, then, as is respectfully submitted, we have a proceedings to be conducted by a commissioner of very limited jurisdiction, and whose powers are predicated entirely upon the existence of the relation of employment, who may predicate an order by which the claimant may force his adversary to pay him the amount of the award, without the alleged employer having any right or power whatsoever to obtain a judicial determination as to whether the commissioner was acting within or or beyond his jurisdiction. If this be the case, then it is only necessary, in order to establish the liability of an alleged employer, and thus deprive him of his property under execution, that the commissioner shall find from any source of information which he may elect, that the matter does fall within his jurisdiction, and his award will become final and conclu-

sive for the reason that it need not even be made to appear from his report upon what his conclusions of jurisdiction are based, for it is perfectly apparent that the District Court could not review his conclusions upon the evidence upon which he based such conclusions, when that evidence does not appear from his report and cannot be ascertained by the court.

However, it is respectfully submitted that even where the conclusion of the court of limited jurisdiction that the matter in question falls within his jurisdiction is based upon the evidence taken by him at the hearing and reported to the court, so that it may be reviewed, the existence of the jurisdictional facts must still be determined **de novo** whenever the validity of the order is brought before a court of justice.

There are many cases in which the validity of the action of officials of various types is made to rest upon the existence of certain relations where it is held that the existence of such relation is a condition precedent to the lawful exercise of their authority and that the courts in examining their orders will inquire for themselves **de novo** as to the existence of such jurisdictional facts.

This rule has been applied where authority to act depended on whether the individual involved was an "enlisted man" and, therefore, in the army.

McClaughry v. Deming, 186 U. S., 49, 63.
Givens v. Zerbst, 255 U. S., 11, 19.
Runkle v. United States, 122 U. S., 543, 555.
United States vs. Grimley, 137 U. S., 147.
Whether he was a citizen or an alien.
Ng Fung Ho. v. White, 259 U. S., 276.

And, as shown by the many cases cited above, in compensation cases whether he is an employee at all and if so, whether he is an employee of the kind or class with which the compensation commission or commissioner is authorized to deal.

Authorities **supra.**

In the case of Sabariego v. Maverick, 124 U. S., 261, 292, this Court said:

> " 'Wherever one is assailed in person or his property,' said this court in Windson v. Mc Veigh, 93 U. S., 274, 277, 'there he may defend for the liability and the right are inseparable. This is a principle of natural justice, recognized as such by the common intelligence and conscience of all Nations. A sentence of a court pronounced against a party, without hearing him or giving him an opportunity to be heard, is not a judicial determination of his rights, and is not entitled to respect in any other tribunal.' "

It would be hard, we think, to reconcile this language with any holding that the commissioner under the statute in question, could make an award against an alleged employer basing his conclusion upon whatever private inquiry he pleases to make without notice to the person to be thus condemned, and that his conclusions of jurisdiction could not be brought into question in the courts of justice upon any evidence except his report of such unsworn statements as he might have so elicited from strangers, without an opportunity of cross-examination. Indeed, so to hold would be to say that where a commissioner rendered an award based entirely upon the ex parte statement of the claimant that the person against whom he asserted a claim was his employer and failed to disclose to the court upon what his

conclusion was based, the result would necessarily be that the employer would be subjected to liability without a hearing, and thereby deprived of his property without due process, for a hearing is of no consequence whatsoever, if the award may be based upon private inquiries which have been conducted by a commissioner before the hearing took place.

The statute confers upon the commissioner certain limited powers. He does not stand in a position of a court of general jurisdiction. His entire jurisdiction is dependent upon the existence of the relation of employer and employee. These are the jurisdictional facts, for it is only as between an employer and an employee that the commissioner has any power to act, and this fact of employment must always remain subject to determination in some judicial tribunal. The distinction between the power of a court of general jurisdiction to determine the jurisdictional facts upon which its power rests and the power of a commissioner of limited jurisdiction to settle this question, was distinctly stated by Chief Justice Marshall as early as the case of Kempe's Lessee v. Kennedy, et al., 5 Cranch, 173, 185, where the court said:

> "This case differs from the case from third Institute in this. In that case the court was composed of special commissioners authorized to proceed, not in all cases of treason, but in those cases only in which an indictment had been taken before fifteen commissioners. Their error was not in rendering judgment against a person who was not proved by the indictment to have committed the crime, but who, if guilty, they had no power to try. The proceedings there were clearly coram non judice."

In the case of Hartford v. Poindexter, 84 Conn., 131; s. c. 79 Atl., 79, 83, the court said:

> "Municipal authorities in laying out and altering streets and establishing building lines act under special and limited authority. They are inferior tribunals. There is no presumption in favor of their jurisdiction as there is in the case of courts of general jurisdiction. Sears v. Terry, 26 Conn. 273, 280. The judgments of such courts, taken alone, are entirely disregarded, and the proceedings must show their jurisdiction. Kempe v. Kennedy, 9 U. S. 173, 185, L. Ed. 70. If the record shows jurisdiction it is prima facie evidence, but it may be attacked and contradicted in a collateral matter. Sears v. Terry, supra; Culver's Appeals, 48 Conn., 165, 173. 'Whoever relies on a judgment of a court of limited and special jurisdiction must aver and prove the facts necessary to give the court jurisdiction.' "

In the case of McClaughry v. Deming, 186 U. S., 49, 63, treating of a writ of habeas corpus, issued on behalf of an officer of volunteers to avoid a sentence of court-martial by the regular army, this court said, quoting from Runkle v. United States, 122 U. S., 543, 555:

> " 'A court-martial organized under the laws of the United States is a court of special and limited jurisdiction. It is called into existence for a special purpose and to perform a particular duty. When the object of its creation has been accomplished, it is dissolved. * * * Such also, is the effect of the decision of this court, in Wise v. Withers, 3 Cranch, 331, which, according to the interpretation given it by Chief Justime Marshall in Ex parte Watkins, 3 Pet. 193, 209, ranked a court-martial as 'one of those inferior courts of limited jurisdiction whose

judgments may be questioned collaterally.' To give effect to its sentences it must appear affirmatively and unequivocally that the court was legally constituted that it had jurisdiction; that all the statutory regulations governing its proceedings had been complied with, and that its sentence was conformable to law. Dynes v. Hoover, 20 How., 65, 80; Mills v. Martin, 19 Johns. 33. There are no presumptions in its favor, so far as these matters are concerned. As to them, the rule announced by Chief Justice Marshall in Brown v. Keene, 8 Pet. 112, 115, in respect to averments of jurisdiction in the courts of the United States, applies. His language is: 'The decisions of this court require that averment of jurisdiction shall be positive—that the declaration shall state expressly the fact on which jurisdiction depends. It is not sufficient that jurisdiction may be inferred, argumentatively, from its averments.' All this is equally true of the proceedings of courts-martial. Their authority is statutory, and the statute under which they proceed must be followed throughout. The fact necessary to show their jurisdiction, and that their sentences were conformable to law, must be stated positively; and it is not enough that they may be inferred argumentatively."

Again, in the case of Givens v. Zerbst, 255 U. S., 11, 19, this court said:

"Conceding that the possession by the accused of a status essential to the exercise by the court-martial of its power was jurisdictional and therefore may not be held to have existed merely because of an estoppel, and conceding further that, except for the form of the charge, the record failed to establish such status, we are brought to determine, as was the lower court, whether evidence was admissible to show such capacity at the time of the trial and con-

viction and thus make clear the precise condition upon which the court acted. (Italics ours.)

Undoubtedly court-martial are tribunals of special and limited jurisdiction whose judgments, so far as questions relating to their jurisdiction are concerned, are always open to collateral attack. True, also, is it that in consequence of the limited nature of the power of such courts the right to have exerted their jurisdiction, when called in question by collateral attack, will be held not to have existed unless it appears that the grounds which were necessary to justify the exertion of the assailed authority existed at the time of its exertion and therefore were or should have been a part of the record. Wise v. Withers, 3 Cranch, 331; Ex parte Watkins, 3 Pet., 193, 209; Dynes v. Hoover, 20 How., 65; Runkle v. United States, 122 U. S., 543, 555; McClaughry v. Deming, 186 U. S., 49, 62-63.

The question before us is thus a narrow one, since it comes only to this: In a case, such as that before us, where the power to convoke a court-martial is established on the face of the record and the authority of the court to decide the particular subject before it is therefore undoubted, does the right exist, in the event of a collateral attack upon the judgment rendered, made on the ground that a particular jurisdictional fact upon which the court acted is not shown by the record to have been established, to meet such attack by proof as to the existence of the fact which the court treated as adequately present for the purpose of the power exerted?

Considering that subject in the light stated, we think the court below was right in admitting, as it did, evidence to show the existence of a military status in the accused, since it did not change the court-martial record but simply met the collateral attack by showing that at the time

of the trial the basis existed for the exertion by the court of the authority conferred upon it.

It is true that general expressions will be found in some of the reported cases to the effect that wherever a fact upon which the jurisdiction of a court-martial or other court of limited jurisdiction depends is questioned it must appear in the record that such fact was established. But these expressions should be limited in accordance with the ruling which we now make. We so conclude because the complete right to collaterally assail the existence of every fact which was essential to the exercise by such a limited court of its authority, whether appearing on the face of the record or not, is wholly incompatible with the conception that, when a collateral attack is made, the face of the record is conclusive. Indeed, some of the leading cases make clear the incongruity of any other conclusion and serve to indicate that the expressions as to the face of the record contemplate, not the record assailed by the collateral attack, but the record established as the result of the proof heard on such attack. Galpin v. Page, 18 Wall. 350; Runkle v. United States, 122 U. S., 543." (Italics ours.)

In this case of Givens v. Zerbst, 255 U. S., 11, 19, as will appear from the foregoing quotation, it was plainly stated that the jurisdictional facts when found by the limited tribunal should have been made part of the record, but it was further held that where they were not so stated, it might be established by proof of these facts in the court where the proceedings were sought to be enforced. This brings us to observe that it does not appear that the finding of the commissioner of the jurisdictional facts was based upon the proceedings at the hearing. Quite to the contrary, it affirmatively appears that the dep-

uty commissioner had made independent investigations outside of and beyond the hearing, and had determined the facts which he found either from independent investigation or from the evidence at the hearing without disclosing which, and surely, a finding based upon independent investigations, made before a hearing, cannot be regarded as part of the record of the hearing itself. It seems to us, therefore, to be clear that it does not appear from this record that the commissioner ever determined in any lawful manner that the jurisdictional facts existed. We submit that when the order was called for and granted, no action could be based upon any inquiries made beyond the same, and that the enforcement or the suspension of this award in the District Court, would necessarily rest upon the conclusions of the court itself as to whether the jurisdiction existed, which we understand to be the effect of the decision in the case of Givens v. Zerbst, supra.

It is insisted by the Appellant that the Commissioner acts, not as a court, but merely in an administrative capacity or as a fact finding agency, but this means but little, as no man can be bound by findings of any other man or body of men under whatsoever name or guise, unless his or their action is within the power or jurisdiction conferred, and unless his or their finding is based upon evidence offered at the hearing which he conducts. However, it is to be observed that it is provided by Section 921 of the United States Code Annotated, Title 38:

> "(a) A compensation order shall become effective when filed in the office of the deputy commissioner as provided in section 919 of this chapter, and, unless proceedings for the sus-

pension or setting aside are instituted as provided in subdivision (b) of this section, shall become final at the expiration of the thirtieth day thereafter."

And that it is provided by subdivision c that upon the failure of the employer to comply with a compensation order making an award, that has become final, any beneficiary of such award or the deputy commissioner may apply for enforcement of the order by the Federal District Court for the judicial district in which the injury occurs, or to the Supreme Court of the District of Columbia if the injury occurred in the District. **If the court determines that the order was made and served in accordance with law,** and that such employer or his officers or agents have failed to comply therewith, the court shall enforce obedience to the order by writ of injunction or other proper process.

It is manifest, therefore, that the finding of the deputy commissioner can be enforced only in the District Court, and there only "if the Court determines that the order was made and served in accordance with law." Here, therefore, we see that subdivision (c) imposes upon the District Court the duty to suspend or set aside the award through injunction proceedings if the order is not an accordance with law, and that the court is permitted to enforce the order only in the event that the court finds that the order was made and served in accordance with the law. It will, therefore, be observed that while the commissioner was authorized to make an award, this award could become final and operative even though not objected to, only through the action of the District Court, and that in either event, whether the enforce-

ment of the order should be enjoined in case of an application therefor, or whether the order should be enforced in case there was no application therefor, was dependent upon the finding of the District Court that the allowance had been made in accordance with the law, which judicial finding could not, of course, be based upon the ex parte inquiries by the commissioner. In this case, a hearing was had, and evidence was adduced upon the jurisdictional fact of employment. Had the order of allowance been based alone upon this hearing, then the question would be simply whether the finding of a court of limited jurisdiction, based upon the evidence adduced at a hearing, of which both parties had notice, was subject to a collateral attack, but where, as in this case, it appears from the award itself that the commissioner has undertaken to base his finding in part upon ex parte inquiries which he made beyond and outside of the hearing, it becomes perfectly apparent that if the question of jurisdiction may not be inquired into **de novo**, then we have a situation in which the commissioner, by rendering his report, based merely upon such investigation as he might in his discretion determine to make, forever preclude the alleged employer from any opportunity whatsoever to enjoy a constitutional guarantee of due process of law. In such event, the alleged employer is placed in a position where he may be made liable and his property subjected to the payment of any claim which the commissioner might approve from any investigation that he saw fit to make. If, as is here contended, this commissioner, whose power to act is conditioned entirely upon the existence of employment, can make an award based in part upon

private inquiry, which is not revealed by the record, and the District Court which must determine whether the award complies with the law or does not, may not try the question except upon the face of the report, and if an erroneous conclusion on the part of the commissioner as to his jurisdiction can be reviewed only upon a partial record, which he pleases to file, showing his doings at the hearing, but not his private inquiries upon which he has in part or in whole, based his conclusion, the result necessarily will be that those who are not employers may nevertheless be rendered liable and beyond the protection of the courts of justice, simply because the commissioner has made some private investigation from which he has been pleased erroneously to declare that he did in fact occupy the position of employer of the claimant.

IV.

THE LONGSHOREMEN'S AND HARBOR WORKERS' ACT SHOULD NOT BE CONSTRUED TO PROVIDE MERELY FOR AN APPEAL TO THE DISTRICT COURT ON QUESTIONS OF LAW.

In determining whether the jurisdiction of the District Court under the Act in question is strictly appellate, that is, confined to the consideration only of errors of law committed by the Deputy Commissioner, it should be noted in the first place that the jurisdiction of the Federal District Courts is not ordinarily appellate, but these courts are ordinarily courts of original jurisdiction.

It should further be noted that there is not one word in the Act in question providing in terms for

an appeal to the District Court. In view of the fact that the District Court is not ordinarily a court of appellate jurisdiction it has been held that even where an act of Congress expressly conferred upon the District Court "appellate jurisdiction" of the judgments and orders of United States Commissioners in cases arising under the Chinese exclusion law, but did not contain any provision as to how the appeal should be heard or what papers were to be filed, or on what testimony the hearing should be had, and did not provide that the hearing should be upon a transcript of the proceedings before the Commissioner, a Chinaman appealing to the District Court was entitled to a trial **de novo.**

Liu Hop Fong v. United States, 209 U. S., 453, 461-2.

In this case, the Court said:

"The Statute is curiously silent as to how the appeal is to be heard; it says nothing as to what papers are to be filed, or as to what testimony shall be given. In our view, giving the Chinaman an appeal in law contemplates that he shall be given the right of a hearing de novo before the District Judge before he is ordered to be deported. It is a serious thing to arrest a Chinaman who, as in this case, has been in this country a number of years, lawfully admitted upon certificate complying with the treaty, and order his deportation without giving him a full opportunity in which to assert his rights before a competent court. There being no provision in the Statute that the hearing shall be upon a transcript of the proceedings before the Commissioner, we think that when a party demands it, Congress intends he shall have the right to a hearing and judicial determination before the District Judge."

In the instant case, every consideration that led the Supreme Court of the United States, in the above cited case, to hold that the Chinaman was entitled to a trial de novo exists. There is, in the Act under consideration, absolutely no provision in regard to how the proceedings in the District Court are to be heard, nor is there any provision as to what papers are to be filed or as to what testimony shall be given. There is no provision that the hearing shall be upon a transcript of the proceedings before the Commissioner. There is no provision for bringing up any record by a bill of exceptions or otherwise. As a matter of fact, the Commissioner, under the express provisions of the Act, is not bound by the ordinary rules of evidence, or by the evidence taken at the hearing before him where the parties may appear and cross-examine, but he may, and according to his recitals (Rec. p. 7, 83) did, make such independent investigation as he sees fit and it is manifestly impossible to bring up in such instances, the evidence on which the Commissioner in fact acts.

Under the Act in question, there is not only no provision for an appeal, and no machinery provided for getting a record to the District Court, but the Act expressly provides for a hearing on a bill in equity for injunction, an original and not an appellate procedure. A hearing on a bill in equity requires, both allegations of fact to show equity, and proof of those facts before the court, to support the alleged equity. The Act refers to and describes the bill in equity as "proceedings for suspension or setting aside of such order", and it further refers to the "institution" of such proceedings. Such terms

certainly would not, ordinarily, indicate the taking of an appeal for the reversal of a cause on account of errors of law committed.

As already pointed out, there is no provision in the Act in question limiting the proof that complainant may make in support of his allegations in the bill that the order of the Commissioner is not in accordance with law, nor confining it to the evidence before the Commissioner. There is no requirement that the Commissioner shall make any finding of fact or that such finding of fact, when supported by substantial evidence, shall be conclusive.

There is no more reason, in natural justice, why a member of a crew, hurt aboard a vessel, or a stevedore loading or unloading a small vessel when hurt aboard the vessel shall be entitled to a hearing and adjudication by a court of competent jurisdiction on record evidence, than there is for a similar hearing on behalf of a longshoreman or stevedore who is loading a large vessel or working upon her. In each instance the claimant or libellant is seeking to recover money from the respondent, his employer, and the respondent is seeking to escape that liability and there is no more inherent justice in taking one employer's money without a hearing on legal evidence, than there is in taking the other's without such a hearing. Natural justice and the reason for having a judicial system at all, both argue for a full hearing on competent evidence unless the Act of Congress can, and in fact does, clearly prohibit it.

Again the case is essentially an admiralty case, and in admiralty on appeal to the Circuit Court of Appeals, the trial is de novo, (Reid vs. Fargo, 241

U. S., 544.—60 L. Ed. 1156; Duche vs. American Schooner "John Twohy", 255 U. S. 77; Munson Steamship Line vs. Miramor, 167 Fed., 960). Even if we should concede that Congress, under the Constitution can deny a trial de novo in the Federal District Court, dealing as we are now with the question of presumptions, it would seem that the intention of Congress to dispense with the rule applying to admiralty appeals generally should be very clearly stated in order to justify departure from the general rule.

If any presumption exists as to the intention of Congress as to procedure on appeal, it is in favor of rather than against a trial de novo in the District Court. To this effect, see the case of Duncan vs. The Frances Wright, 105 U. S., 381—26 L. Ed., 1100, as follows:

> "Undoubtedly, if Congress should give an appeal in admiralty causes and say no more, the facts as well as the law would be subject to review and re-trial."

In this same case it was stated that:

> "The constitutional requirements are all satisfied if one opportunity is had for a trial of all parts of the case. Anything beyond that is a matter of legislative discretion, not of constitutional right."

The converse of the foregoing proposition must be true, viz: that constitutional requirements are not satisfied except by at least one trial and that, by a constitutional Federal Court, of all parts of a case, viz: the facts as well as the law. If a party to an admiralty suit is entitled to a trial of his case by a constitutional court, this right surely extends to

the whole of his case, i. e., to the trial of the fact questions as well as those of law.

Two principal reasons are assigned for saying that the Act, by implication, prohibits a full hearing on competent evidence before a court of competent jurisdiction. The first of these is that the primary object of the statute was to give the employee a speedy remedy. The second is that the Act provides for the setting aside, suspension or modification of the order of the Commissioner if it is "not in accordance with the law."

As to whether the Act should be construed as depriving a party of a right to trial on competent evidence before a court of competent jurisdiction because the policy of the Act was to give speedy relief, it seems to us that the courts that have dealt with this matter have over-emphasized this purpose and have given it entirely too great weight. As a matter of fact, the primary purpose of the Act, as shown by the authorities, is to make the business of the employer bear a portion of the burden incident to the business, by requiring it to support, in part, the employee injured in the course of his employment, while he is disabled, or after his death, to support, in part, his dependents regardless of negligence or fault. Incidentally, of course, it was intended and expected that in view of the fact that responsibility existed irrespective of negligence or fault, there would be much less occasion for litigation and, therefore, much greater speed in most instances in getting the relief provided. That the act will have this effect is perfectly manifest from the fact that in many, if not most cases, compensation will be paid under the Act without litigation. This must be

comparatively few cases in which the facts would justify a controversy in regard to the payment of compensation. Where the facts are undisputed and the employer is clearly liable under the Act, there seems to be no reason for anticipating that a controversy will be instituted and prosecuted for mere purposes of delay whether the trial is de novo or only on questions of law. It is likely that an employer seeking delay would resort to the courts as readily in the one instance as in the other. As for delay incident to a trial de novo, it seems to us manifest that such delay would be inconsequential in any event. If a case is brought up from the Commissioner and is to be heard on the evidence before the Commissioner, either for an adjudication of the correctness of that decision on the independent judgment of the court, or on the question of whether the evidence is sufficient to support the order, the testimony before the Commissioner must be read to the court and presented to it to enable it to render a decision in either event. If the case comes up for trial de novo, it will necessitate a hearing of the witnesses before the court. Ordinarily, such a trial might involve several hours or a day's time, or even two days' time. In no event, however, would the trial de novo ordinarily involve any very considerable period of time, so that the idea that there would be much greater delay by a trial de novo is not, we submit, justified in fact.

In short, the cases in which there will be controversy are, and will be so few that in the main the purpose of a speedy relief to the employee will be accomplished. Where there is a controversy the delay incident to a trial de novo will not be material-

ly greater. In any event, such delay as may be necessary to the proper presentation of the facts to the court to enable it, as a court of competent jurisdiction, to give the parties a fair hearing on legal evidence, should not deprive a party of the right to such a hearing.

As to the use of the phrase "not in accordance with law," it is manifest that this phrase may in some instances be used as indicating an intention on the part of the legislative body to provide only for a review of errors at law. It is also manifest that it may, as appropriately be used to indicate an intention on the part of the Legislature to confer on the court the power to determine, on legal evidence and according to its independent judgment, whether the facts show that the order of the Commissioner was not in accordance with law. For instance, in this case, there can be no doubt that if the injury complained of did not occur on a vessel or on navigable waters, or if the relation of master and servant did not exist, or if the claimant was not engaged in a maritime employment, or if engaged in a maritime employment it was of such character that the State Compensation Laws could give relief, or if the employee was a master or member of a crew of a vessel, or was engaged by the master to load or unload or repair any small vessel under eighteen tons, or if the employee was an officer or employee of the United States, or any agency thereof, or of any State or Foreign Government, or any political subdivision thereof, or if the injury was caused solely by intoxication or willful intention of the employee to injure or kill himself or another employee, the order of the Commissioner was "not in accordance with law."

The Act in question does not, in terms, provide either for an appeal or for a reversal for errors in law, nor does it provide for remanding the case to the Commissioner in the event errors at law are found by the District Court. It provides for an original proceedings by a bill in equity to determine, not whether there has been an error or errors in law committed at the hearing before the Commissioner resulting in the order, but to determine whether the order is in accordance with law, that is, whether under the law as applied to the facts, the order is legally proper. The District Court is to detemine this question, not as an appellate court, but under an original proceedings in the form of a bill in equity, and there is no provision that it shall determine the question only on the evidence that was before the Commissioner. What was before the Commissioner need not be evidence received according to law, and, indeed, the order need not be based on evidence taken at the hearing at all, but may be based, in part, or entirely, on the private investigations of the Commissioner. Instead of providing for a reversal and remanding of the case, the Act provides only for suspending or setting aside the order in whole or in part. Let us suppose, therefore, that there have been glaring errors committed by the Commissioner in the exclusion of evidence offered at the hearing, what does the court do if it is confined to an examination only of the evidence before the trial court? Is it to say that an error or errors of law in excluding proper testimony made the order not in accordance with law, and that it must be set aside entirely? If it does, then the order would have to be set aside or its enforcement permanently en-

joined, and the claimant would either be defeated entirely, or he would have to rub out and start over before the Commissioner and where, we may ask, would be the saving in time in such a procedure or a saving in money either?

If the District Court could not hear the evidence, but was authorized only to determine whether, as a matter of law, there was any evidence to support the verdict, it would be compelled in every case, either to set aside the order by injunction for errors in law, or it would be compelled to affirm the order though relevant evidence that might have changed the result was excluded.

It is also worthy of note that while the Act in question is in the main modelled on the New York Workmen's Compensation Act, it omitted certain essential provisions of that Act expressly providing for an appeal in the ordinary sense and a review only of questions of law. The fact alone that these provisions have been omitted in adopting in part the New York Act is strongly persuasive that the Congress did not intend to provide for an appeal for the review only of questions of law. We have been unable to get access to a complete copy of the New York Act, but we find in the Workmen's Compensation State Law by Hill and Wilkin, at page 223, a summary of the New York Workmen's Compensation Act. According to that summary, it provides for hearing before a Commissioner on application of either party, and that at said hearing either party may present evidence and be represented by counsel. It also provides that the decision of the Board shall be final as to all questions of fact, and that an appeal may be taken to the Appellate Division of

the Supreme Court, and that the Board of Commissioners may certify on such appeal questions of law. This Act, therefore, expressly provides for an appeal which the present act does not do. It provides for certifying questions of law only, which the present act does not do, and it provides that the decision of the Commissioners shall be final as to all questions of fact, which the present act does not do. It seems clear, therefore, that Congress has eliminated from the New York Act upon which the Longshoremen's and Workmen's Compensation Act is in a measure modelled, those express provisions which make the decision of the Commissioner final on all questions of fact, and for the taking of an appeal and for the certifying only questions of law for review. If Congress had intended to adopt the provisions of the New York Act concerning an appeal and the hearing thereof, it is strange indeed, that instead of expressly providing that the Commissioner's finding of fact should be final and instead of providing for the certifying of questions of law only, it has seen fit to provide only an original proceeding by bill in equity for the purpose of setting aside, modifying or suspending the Commissioner's order if it is not in accordance with law. The very fact that Congress has excluded these provisions is a strong argument that it was never intended that there should be an appeal in the ordinary sense bringing up only questions of law, but rather that the District Court was given jurisdiction on a trial de novo in an original proceeding by a bill in equity to determine whether, under the facts and the law, the order of the Commissioner was correct.

That the liability asserted by the petitioner, Knudsen, is within the admiralty and maritime jurisdiction does not admit of doubt.

Southern Pacific Co. v. Jensen, 244 U. S., 205, 216, 217.
Knickerbocker Ice Co. v. Stewart, 253 U. S., 149.
State of Washington v. W. C. Dawson & Co., 264 U. S., 219.
Noguiera v. New York, N. H. & H. R. Co., 281 U. S., 128.

That exclusive jurisdiction of all admiralty and maritime cases was, prior to the Longshoremens' and Harborworkers' Compensation Act, expressly conferred upon the federal district courts saving the common law remedy, if any, in the state courts, is likewise not open to controversy, and this jurisdiction of the federal district courts to hear and determine all admiralty and maritime causes should not be taken away from those courts except by language plainly requiring that result. The language of the act under consideration not only fails to express any clear intent on the part of Congress to withdraw the jurisdiction of district courts over admiralty causes of this character, but, as pointed out above, is entirely consistent with the retention and exercise of this jurisdiction when either party sees fit to invoke its jurisdiction to review the award made by the commissioner. As already pointed out, the use of the phrase "when not in accordance with law" is equivocal and is certainly subject to the construction hereinabove contended for.

The only cases cited for petitioner involving an Act providing for reversal if the orders or decrees

are "not in accordance with law" are cases involving appeals from decisions of the Board of Tax Appeals where it is made perfectly manifest from other provisions of the Act that the appeal is an appeal in the ordinary sense and brings up only questions of law. In the tax appeals cases the assessment of taxes was, of course, a purely executive and administrative act. The Court of Appeals, a court ordinarily of appellate jurisdiction was given power to review the decision of the Board and if not in accordance with law to "modify or to reverse the decision of the Board". The Act expressly provides for the preparation of the record on appeal and defines the rules of evidence before the Board of Tax Appeals. Previously there had been no rules of evidence and the tax payer, after getting a ruling before the Board of Tax Appeals was at liberty to pay the tax and to sue to get it back, thereby getting a trial de novo, in the district court, of the entire question. The amended act, however, providing for rules of evidence before the Board of Tax Appeals, provided a method of preparation of the record on appeal and expressly provided for a review and reversal of the decision of the Board of Tax Appeals, so that from the entire Act it was perfectly manifest that an appeal in the ordinary sense was provided for. There is a manifest distinction between such cases and the present which is pointed out with great clearness and distinctness in the case of Liu Hop Fong v. United States, 209 U. S., 453.

Nothing else is urged for the taking away of jurisdiction so clearly conferred by Congress except the argument of convenience that to allow a trial de novo would result in somewhat delaying recovery in

such cases. As pointed out above, comparatively few cases under this act are likely to be appealed and the delay resulting from a de novo hearing in these few cases is so inconsequential, that the argument is of doubtful force. But certainly it must be that jurisdiction once clearly vested in a constitutional court should not be held to be withdrawn and vested in an administrative officer, board, or tribunal not learned in the law and not bound by ordinary rules of evidence by mere implication. Conceding the power of Congress, a party should not be deprived of the security of a judicial hearing heretofore plainly provided for, unless that result is made necessary by the clear and unmistakable language of the act now under consideration.

Ng Fung Ho v. White, 259 U. S., 276.
United States v. Woo Jan, 245 U. S. 552, 556.

We submit that there was no language of the act clearly or by necessary, or even proper implication, withdrawing a judicial hearing by the federal district courts in such maritime cases.

V.

TO CONSTRUE THE LONGSHOREMENS' AND HARBOR WORKERS' COMPENSATION ACT AS CONTENDED FOR BY PETITIONERS WOULD VIOLATE ARTICLE 3, SECTIONS 1 AND 2 OF THE CONSTITUTION AND WOULD NOT AFFORD DUE PROCESS AS REQUIRED BY THE FIFTH AMENDMENT.

It seems to us so manifest that the status of employer and employee must exist before the deputy commissioner ever has jurisdiction to make an

award under the Longshoremens' and Harbor Workers' Compensation Act, and that the district court in any event had the right and power to determine independently of the finding of the deputy commissioner whether this jurisdictional fact, without which he had no power to act, did exist, that there is no real necessity to enter upon a discussion of the constitutional question above suggested. However, in view of the extended discussion of this question in brief for petitioner, Knudsen, and the apparent misunderstanding of the thought underlying the opinion of the Court of Appeals and the District Court, we shall undertake somewhat to amplify that thought and to demonstrate its soundness as applied to the contention of petitioners.

The Longshoremen's and Harbor Workers' Compensation Act (44 Stat. 1424; 33 U. S. C. A. Secs. 901-950 inclusive) deals by its express terms only with the liability of employers to employees who "are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any dry docks)" (33 U. S. C. A. Sec. 902 (4). This liability of the employer to make compensation to the employee is imposed "only if the disability or death (of the employee) results from an injury occurring upon the navigable waters of the United States (including any dry dock) and if recovery for the disability or death through Workmen's Compensation proceedings may not be validly provided by State law * * ". (33 U. S. C. A. Sec. 903).

The act accordingly and necessarily deals only with a liability clearly within the exclusive admiralty and maritime jurisdiction.

Southern Pacific Co. v. Jensen, 244 U. S., 216, 217.
Knickerbocker Ice Co. v. Stewart, 253 U. S., 149.
State of Washington v. W. C. Dawson & Co., 264 U. S., 219.
Nogueira v. New York, N. H. & H. R. Co., 281 U. S., 128.

Congress under Article 111, Sec. 2 of the Constitution and Article 1, Sec. 8 thereof unquestionably "has paramount power to fix and determine the maritime law which shall prevail throughout the country."

Southern Pacific Co. v. Jensen, 244 U. S., 205, 214-15.

And it is said in State of Washington v. W. C. Dawson & Co., 264 U. S., 219; 44 S. Ct., 302, 305:

> "Without doubt Congress has power to alter, amend, or revise the maritime law by statutes of general application embodying its will and judgment. This power, we think, would permit enactment of a general employers' liability law or general provisions for compensating injured employees * *."

As is said in New York Central R. R. Co. v. White, 243 U. S., 188, 201, of the New York Compensation law:

> "The statute under consideration sets aside one body of rules (regulating the rights of employer and employee) only to establish another system in its place."

The "system of rules", established by the act under consideration in the place of the rules of the admiralty law previously existing, just as truly involves rights and liabilities under the admiralty and maritime jurisdiction as did the original system of

rules. In short, the act creates a liability from an employer to an employee engaged in a maritime employment when injured upon the navigable waters. The right of action of the employee and the liability are essentially within the admiralty and maritime jurisdiction.

In Nogueira v. New York, N. H. and H. R. Co., 281 U. S., 128, an employee of a railroad was injured while engaged in loading a car float lying in navigable waters, and the question was whether he could maintain an action under the Federal Employers' Liability Act, or whether the Longshoremen's and Harbor Workers' Compensation Act afforded him an exclusive remedy. It was held that the latter act did afford his exclusive remedy, the court, through Mr. Chief Justice Hughes, saying:

> "In the present instance had the petitioner been engaged in intrastate commerce, his case still would have been within the maritime jurisdiction of the federal courts, and he would have been denied the benefit of the state compensation law. * * In these circumstances Congress dealt with the maritime employment of longshoremen whose injuries sustained on navigable waters would fall within the exclusive maritime jurisdiction, * * * ."

The Longshoremen's & Harbor Workers' Compensation Act though it creates a maritime liability is as truly a part of the maritime law as is the law of limited liability, of which it is said in Butler v. The Boston & Savannah S. S. Co., 130 U. S., 527; 32 L. Ed., 1017, 1024:

> "The law of limited liability, as we have frequently had occasion to assert, was enacted by Congress as a part of the maritime law of this country * * * ."

Or again, as is said in The Scotland, 105 U. S., 24, 29; 26 L. Ed., 1001, 1003:

> "But it is enough to say that the rule of limited responsibility is now our maritime rule. It is the rule by which through the act of Congress, we have announced that we propose to administer justice in maritime cases."

So the rule of liability of a maritime employer to a maritime employee for injuries or death on the navigable waters is a part of the general maritime law.

In such cases, it is manifest that the question of whether the employer is liable to his employee under the new system of rules established by the Longshoremen's and Harbor Workers' Compensation Act, is a matter of judicial inquiry—a matter of substantive law. And that this is true is expressly recognized in New York Central R. R. Co. v. White, 243 U. S., 188, 194, where it is said of the New York Compensation Act on which the Act in question is modelled:

> "Provision is made for the establishment of a Workman's Compensation Commission with administrative and **judicial functions, including authority to pass upon claims to compensation on notice to the parties interested.**" (Italics ours).

That the hearing before the Compensation Commissioner on evidence produced by both parties was considered the exercise of a judicial function is made further apparent by the court's proceeding to consider and determine whether such hearing on notice provided "due process" although no jury trial was prescribed.

In Western Metal Supply Co. v. Pillsbury, 172 Cal. 407, where a hearing before an Industrial Commission was provided in compensation cases, similar to that provided under the act now being considered, it was held that the commission was in the exercise of judicial power in conducting such a hearing. The Court said:

> The commission, in exercising these powers, is performing precisely the same functions that are performed by any court in passing upon questions brought before it. 'Judicial power,' says Mr. Justice Miller in his work on the Constitution, 'is the power of a court to decide and pronounce a judgment and carry it into effect between persons who bring a case before it for decision.' Muskrat v. U. S., 219 U. S., 346, 31 Sup. Ct., 250, 55 L. Ed., 246."

And on the same page the court clearly distinguishes hearings before the interstate commerce commission and similar bodies as follows:

> "We do not overlook the consideration that administrative boards and officers are often called upon to determine the facts and apply the law to those facts Such bodies and officers do not exercise judicial functions in the strict sense of that term. Ex parte Whitley, 144 Cal. 167, 77 Pac. 879, 1 Ann. Cas. 13. We might cite many cases dealing with the acts of bodies like the interstate commerce commission, boards of medical and dental examiners, and other boards or officers authorized to pass on various questions. These cases generally hold that judicial power is not exercised in the performance of the various functions committed to such boards. But none of these cases had to do with a situation like the present, where the law creates a right in one person against another and vests a board with the jurisdiction to hear complaints,

to issue process, to compel the attendance of witnesses, to determine conclusively the issues raised by the pleadings of contending parties, and to make a final judgment or award determining the rights of those parties. As was said in State v. Hawkins, 44 Ohio St. 109, 5 N. E. 232, one of the cases cited by the respondents:

"It may be safely conceded that power to hear and determine rights of property and of persons between private parties is judicial, and can only be conferred on the courts."

The court further pointed out that in the absence of a special constitutional amendment permitting it, such judicial powers could not be conferred on a commission, under constitutional provisions vesting judicial powers in constitutional courts.

Van Camp Sea Food Co. v. State Fish & Oyster Comm., 75 Cal. App. 764.

Similarly in Pine vs. State Ind. Comm., 107 Okla., 40, 229 Pac., 784, a hearing by an Industrial Commission, substantially identical with that provided for in the act under consideration, was held to be the exercise of judicial power, and it was further held that constitutional appellate courts could not be deprived of their jurisdiction to review such cases as they did other judicial proceedings.

Carstens v. Pillsbury, 172 Cal., 572.

Gouanillou v. Industrial Accident Commission, 184 Cal., 418.

Yosemite Lbr. Co. v. Ind. Acc. Comm, 187 Cal., 774.

And in Helfrick v. Dahlstrom Metallic Door Co., 256 N. Y., 199 it is said of a workman's compensation board or commission:

"Whatever confusion, however, there may be in distinguishing legislative from judicial acts

regarding rates does not arise in determining the status or injuries of a workman. Here the board or commission determines the events that have passed—the employment, the wages, the accident, the injury. Such readily submit to oral proof, and the process of finding them is of a judicial nature. Such a board has the dignity and the form of many of our courts, the only distinction being that of name."

These cases are in accord with Kansas v. Colorado, 206 U. S., 46, where it is said:

"Speaking generally, it may be observed that the judicial power of a nation extends to all controversies justiciable in their nature, and the parties to which or the property involved which may be reached by judicial process, and when the judicial power of the United States was vested in the Supreme and other courts, all the judicial power which the nation was capable of exercising was vested in those tribunals, and unless there be some limitations expressed in the Constitution, it must be held to embrace all controversies of a justiciable nature arising within the territorial limits of the nation, no matter who may be the parties thereto."

"By this (Article 3, Section 1 of the Federal Constitution) is granted the entire judicial power of the nation. Section 2, which provides that the judicial power shall extend to all cases in law and equity arising under this constitution, the laws of the United States, etc., is not a limitation or an enumeration. It is a definite declaration, a provision that the judicial power shall extend to, that is shall include the several matters particularly mentioned, leaving unrestricted the general grant of the entire judicial power."

In most cases arising under state compensation acts the objection that the commissioner is ex-

ercising judicial functions, is overcome by the fact that the parties have voluntarily agreed by election to have their controversy tried by such an arbitrator.

Booth Fisheries Co. v. Industrial Comm., 271 U. S., 208.
Deibeikis v. Link-Belt Co., 261 Ill. 454.
Borgnis v. Falk Co., 147 Wis. 327.
Greene v. Caldwell, 170 Ky. 571.
Hawkins v. Bleakly, 243 U. S., 210.

And in still others the objection is held untenable because the commissioner though authorized to hear evidence and make an award, is not authorized to enter a judgment enforceable by execution until an appeal is had to a court of competent jurisdiction and a trial de novo had.

Shea v. North Butte Mining Co., 55 Mont. 522.

Whatever may be true under the state constitutions, the question is whether Congress can deprive the constitutional federal courts of jurisdiction to hear and determine, according to their independent judgment of the law and the facts, controversies or cases involving the liability vel non of the employer to the employee under the new system of rules created by this act which imposes liability only when the disability or death occurs under such circumstances as to bring the case within the admiralty and maritime jurisdiction?

By Article 3, Section 1 of the Constitution of the United States, it is provided:

"The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the Supreme and Inferior Courts, shall

hold their offices during good behavior, and shall at stated times, receive for their services, a compensation which shall not be diminished during their continuance in office."

Section 2 of Article 3 of the Constitution of the United States provides:

"The judicial power shall extend * * * to all cases of admiralty and maritime jurisdiction * * ."

The distinction between the constitutional courts provided for by Article 3, section 1 of the Constitution, and legislative courts that may be created by Congress is quite clearly drawn in Ex parte Bakelite Corporation, 279 U. S., 438, where the court was considering the question of whether the court of Custom Appeals was a constitutional court, or a statutory or legislative court. The Supreme Court in that case said:

"When Article III of the Constitution declares, in Section 1, that the judicial power of the United States shall be vested in one Supreme Court and in 'such inferior courts as the Congress may from time to time ordain and establish,' and prescribes, in Section 2, that this power shall extend to cases and controversies of certain enumerated classes, it long has been settled that Article III does not express the full authority of Congress to create courts, and that other articles invest Congress with power in the exertion of which it may create inferior courts and clothe them with functions deemed essential or helpful in carrying those powers into execution. But there is a difference between the two classes of courts. Those established under the specific power given in Section 2 of Article III are called constitutional courts. They share in the exercise of the judicial power defined in

that section, can be invested with no other jurisdiction, and have judges who hold office during good behavior, with no power in Congress to provide otherwise. On the other hand, those created by Congress in the exertion of other powers are called legislative courts. Their functions always are directed to the execution of one or more of such powers and are prescribed by Congress independently of section 2 of Article III, and their judges hold for such term as Congress prescribes, whether it be a fixed period of years or during good behavior." (Italics ours.)

Also it was said,

"Legislative courts also may be created as special tribunals to examine and determine various matters, arising between the government and others, which from their nature do not require judicial determination and yet are susceptible of it. The mode of determining matters of this class is completely within congressional control. Congress may reserve to itself the power to decide, may delegate that power to executive officers, or may commit it to judicial tribunals."

The judicial power, that is, jurisdiction of constitutional courts, vests by virtue of the constitution and Congress is without power to withdraw the jurisdiction which the Constitution has thus vested in courts of this character and confer it in whole or in part on legislative tribunals or upon administrative officers or boards.

Ex parte Bakelight Corporation, 279 U. S., 438.

American Insurance Co. v. Carter, 1 Peters, 511, 546; 7 L. Ed., 242.

Den v. Hoboken Land & Imp. Co., 18 Howard, 272; 15 L. Ed. 372.

Kansas v. Colorado, 206 U. S., 46.

Nor can Congress add to the jurisdiction of constitutional courts so as to enable them to render decisions other than "judicial judgments."

Ex parte Bakelite Corporation, 279 U. S., 438.

As is said in American Insurance Co. v. Carter, 1 Pet., 511, 546; 7 L. Ed., 242, of the courts created by Congress for the Territory of Florida:

> "These courts, then are not constitutional courts, in which the judicial power conferred by the constitution on the general government, can be deposited. They are incapable of receiving it."

In Den v. The Hoboken Land & Improvement Co., 18 How., 272, 15 L. Ed., 372, Mr. Justice Curtis said:

> "To avoid misconstruction on so grave a subject, we think it proper to state that we do not consider Congress can either withdraw from judicial cognizance any matter which from its nature is the subject of a suit at common law, or in equity, or in admiralty; nor on the other hand can it bring under judicial power a matter which, from its nature is not a subject for judicial determination."

As pointed out above, the controversy in this case is "from its nature" the subject of a suit in admiralty which Congress cannot withdraw from judicial cognizance of the constitutional courts created under Article 3, Section 1 of the Constitution. One private party demands monied compensation of another under the new maritime rules created by this act, and the latter denies that liability. While he concedes that a maritime employer may be and is made liable by the act in question to pay his em-

ployee compensation for injuries suffered in such employment on navigable waters, he denies that he is such employer and claims that his property will be confiscated if he is compelled to pay the claimant. There is thus presented a judicial controversy or case involving the question of liability vel non under the new maritime law. While Congress can doubtless provide for a preliminary investigation by some administrative officer or board or by some legislative court, there must, nevertheless, be somewhere in the course of the proceedings a judicial trial of this question by a constitutional court acting on its own independent judgment upon the facts as well as the law, or due process is denied.

Ohio Valley Water Co. v. Ben Avon Borough, 253 U. S., 287.

Bluefield Water Works & Imp. Co. v. Public Service Comm., 262 U. S., 679.

G. M. & St. P. R. R. Co. v. Minnesota, 134 U. S., 418.

Ng Fung Ho v. White, 259 U. S. 276.

To say that in some instances, that is when the common law affords a remedy, state courts may administer the admiralty law concurrently with the Federal District Courts begs the question and in like manner, to say that Congress may decline to confer or vest admiralty jurisdiction in some cases in which such jurisdiction might properly be conferred, also begs the question. The question is not whether a state court may in some instances exercise admiralty jurisdiction or whether the Congress may withhold or withdraw jurisdiction of some cases which might otherwise come within the admiralty jurisdiction, but the question is, whether when Congress does see fit to vest the federal judicial power it can vest

this power in a federal administrative officer or body or in a federal court other than a constitutional federal court. This question we submit is fully answered by the provisions of the constitution itself and by the cases above cited, namely:

American Insurance Co. v. Carter, 1 Peters, 511, 546; 7. L. Ed., 242.
Den v. Hobocken Land & Imp. Co., 18 Howard, 272; 15 L. Ed. 372.
Kansas v. Colorado, 206 U. S., 46.
Ex parte Bakelite Corporation, 279 U. S., 438.

Nor does the fact that territorial courts can be given the power to hear admiralty cases militate against our contention, for the reason that such courts are not, strictly speaking, "courts of the United States; or in other words, the jurisdiction with which they are invested is not a part of the judicial power defined by the third article of the Constitution", for the reason that Congress in legislating for the territories, "exercises the unlimited powers of the general and of a State Government."

The S. S. City of Panama v. Phelps, 101 U. S., 453.

Cases like Grant Smith-Porter Ship Co. v. Rohde, 257 U. S., 469, and Millers Indemnity Underwriters v. Brand, 270 U. S., 469, likewise do not reach the point. They are simply to the effect that where the rights and liabilities involved have no direct relation to navigation and the application of a local rule or law enacted by the state does not materially affect any characteristic feature of the maritime law or interfere with its proper harmony or uniformity, such cases may be withdrawn from the field of admiralty law by state enactment and exclusive jurisdiction of them conferred on the state courts.

But the act now under consideration by its express terms does not deal with any case where the local laws of the state can be made to apply under the rules announced in the cases last above cited, but by its terms deals only with a liability which cannot be withdrawn from the field of admiralty and maritime law. These cases, therefore, are not authority for saying that jurisdiction may be withdrawn from the constitutional federal courts and conferred on an administrative board or officer or upon a purely legislative tribunal.

The argument that this court has upheld state compensation acts providing for a final determination of liability of employer to employee by an administrative board subject only to appeal on question of law against the contention that these laws violated the due process clause of the Fourteenth Amendment, overlooks entirely the provisions of Article 3, sections 1 and 2 of the Constitution.

Congress is not free to make any process "due process", and the first test to determine whether due process is provided in a given case is to examine the constitution itself to see whether the process conflicts with any of its provisions. This rule was laid down in Martin v. Hunter's Lessee, 1 Wheaton, 304, where it is said:

> "To what principles, then are we to resort to ascertain whether this process, enacted by Congress, is due process? To this the answer must be two fold. We must examine the constitution itself, to see whether this process be in conflict with any of its provisions. If not found there, we must look to those settled usages and modes of proceeding existing in the common and statute law of England before the

emigration of our ancestors and which are shown not to have been unsuited in their civil and political condition by having been acted on by them after the settlement of this country."

When we look to the Constitution we find that the judicial power of the federal government in all cases in admiralty must be exercised by a constitutional court provided for by Article 3, section 1, and it is clear that unless a judicial hearing on the facts and the law is accorded the act would violate the due process clause of the Fifth Amendment.

Ng Fung Ho v. White, 259 U. S., 276.

"A statute must be construed, if fairly possible, so as to avoid not only the conclusion that it is unconstitutional but also grave doubts upon that score."

United States v. Jim Fuey May, 241 U. S., 394, 401.

United States v. LaFranca, 282 U. S. 568.

"A condition (in a statute) should not be implied which, to say the least, would raise a grave question as to the constitutional validity of the act."

Russian Volunteer Fleet v. United States 282 U. S. 481.

The Longshoremen's & Harbor Workers' Compensation Act is without doubt a part of the admiralty and maritime law. Jurisdiction in the federal courts to determine whether a liability arises under this admiralty law must by the express terms of the Constitution be vested exclusively in the constitutional courts. Whatever may be true of the power of a state legislature to provide compensation to non-maritime employees and to confer on administrative bodies jurisdiction to hear and determine

liability of employers thereunder, the fact remains that by the mandatory provisions of Article III, Sections 1 and 2, jurisdiction of the constitutional federal courts to hear and determine cases within the admiralty and maritime jurisdiction whether or not liability is created by statute, cannot be taken from such courts and conferred upon an administrative board or officer. In other words, the admiralty law in so far as it involves controversies or cases between individuals involving liability of one individual to pay and of another individual to receive money for an injury or for death within the admiralty jurisdiction, must be administered by a constitutional federal court, and the federal constitution prohibits the administering of this law by any merely administrative board or body or by a tribunal of any other kind. If, therefore, the act under consideration be construed as taking away from these constitutional courts the power at some stage of the proceeding to determine this maritime liability on their own independent judgment of the law and the facts, it would violate Article 3 of the Constitution and would not afford due process under the Fifth Amendment.

It is respectfully submitted that the judgment of the Circuit Court of Appeals affirming the judgment of the District Court should not be disturbed.

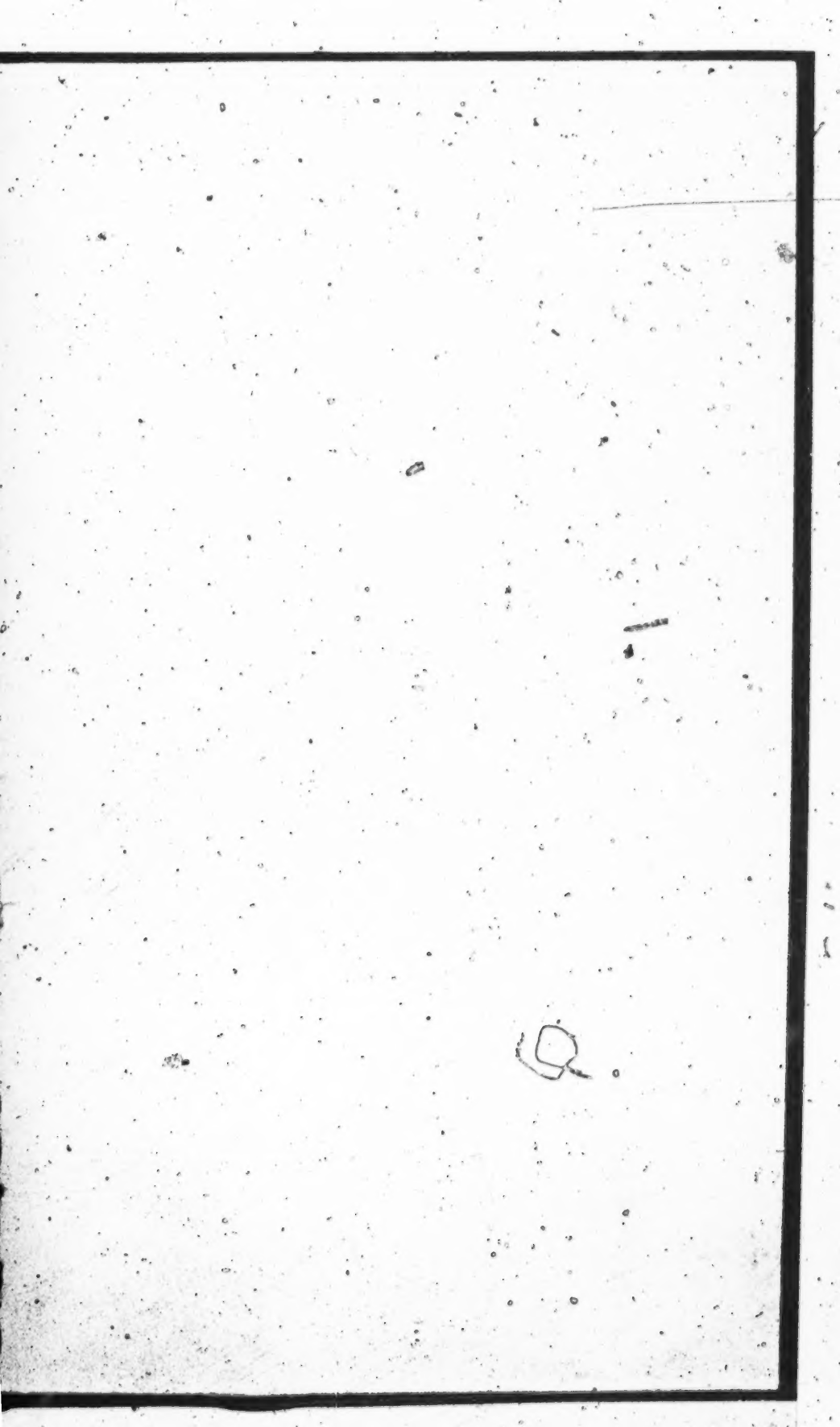
Respectfully submitted,

HARRY T. SMITH,

WM. G. CAFFEY,

Solicitors for Charles Benson.

October, 1931.



CORRECTED COPY

SUPREME COURT OF THE UNITED STATES.

Nos. 19 and 20.—October Term, 1931.

Letus N. Crowell, as Deputy Commissioner for the Seventh Compensation District of the United States Employees' Compensation Commission, Petitioner,

19 vs.

Charles Benson.

Letus N. Crowell, as Deputy Commissioner for the Seventh Compensation District of the United States Employees' Compensation Commission, and J. B. Knudsen, Petitioners,

20 vs.

Charles Benson.

On Writs of Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

[February 23, 1932.]

Mr. Chief Justice Hughes delivered the opinion of the Court.

This suit was brought in the District Court to enjoin the enforcement of an award made by petitioner Crowell, as deputy commissioner of the United States Employees' Compensation Commission, in favor of the petitioner Knudsen and against the respondent Benson. The award was made under the Longshoremen's and Harbor Workers' Compensation Act (Act of March 4, 1927, c. 509, 44 Stat. 1424; U. S. C. Tit. 33, secs. 901-950) and rested upon the finding of the deputy commissioner that Knudsen was injured while in the employ of Benson and performing service upon the navigable waters of the United States. The complainant alleged that the award was contrary to law for the reason that Knudsen was not at the time of his injury an employee of the complainant and his claim was not 'within the jurisdiction' of the deputy commissioner. An amended complaint charged that the Act was unconstitutional upon the grounds that it violated the due

process clause of the Fifth Amendment, the provision of the Seventh Amendment as to trial by jury, that of the Fourth Amendment as to unreasonable search and seizure, and the provisions of Article III with respect to the judicial power of the United States. The District Judge denied motions to dismiss and granted a hearing *de novo* upon the facts and the law, expressing the opinion that the Act would be invalid if not construed to permit such a hearing. The case was transferred to the admiralty docket, answers were filed presenting the issue as to the fact of employment, and the evidence of both parties having been heard, the District Court decided that Knudsen was not in the employ of the petitioner and restrained the enforcement of the award. 33 F. (2d) 137; 38 F. (2d) 306. The decree was affirmed by the Circuit Court of Appeals (45 F. (2d) 66) and this Court granted writs of certiorari. 283 U. S. 814.

The question of the validity of the Act may be considered in relation to (1) its provisions defining substantive rights and (2) its procedural requirements.

First. The Act has two limitations that are fundamental. It deals exclusively with compensation in respect of disability or death resulting "from an injury occurring upon the navigable waters of the United States" if recovery "through workmen's compensation proceedings may not validly be provided by State law," and it applies only when the relation of master and servant exists. Sec. 3.[1] "Injury", within the statute, "means accidental

[1]Section three of the Act as to "Coverage" provides:

"Sec. 3. (a) Compensation shall be payable under this Act in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law. No compensation shall be payable in respect of the disability or death of—

"(1) A master or member of a crew of any vessel, nor any person engaged by the master to load or unload or repair any small vessel under eighteen tons net; or

"(2) An officer or employee of the United States or any agency thereof or of any State or foreign government, or of any political subdivision thereof.

"(b) No compensation shall be payable if the injury was occasioned solely by the intoxication of the employee or by the willful intention of the employee to injure or kill himself or another".

injury or death arising out of and in the course of employment", and the term "employer" means one "any of whose employees are employed in maritime employment, in whole or in part", upon such navigable waters. Sec. 2 (2) (4). Employers are made liable for the payment to their employees of prescribed compensation "irrespective of fault as a cause for the injury." Sec. 4. The liability is exclusive, unless the employer fails to secure payment of the compensation. Sec. 5. The employer is required to furnish appropriate medical and other treatment. Sec. 7. The compensation for temporary or permanent disability, total or partial, according to the statutory classification, and in case of the death of the employee, is fixed, being based upon prescribed percentages of average weekly wages, and the persons to whom payments are to be made are designated. Secs. 6, 8, 9, 10. Employers must secure the payment of compensation by procuring insurance or by becoming self-insurers in the manner stipulated. Sec. 32. Failure to provide such security is a misdemeanor. Sec. 38.

As the Act relates solely to injuries occurring upon the navigable waters of the United States, it deals with the maritime law, applicable to matters that fall within the admiralty and maritime jurisdiction (Const. Art. III, sec. 2; *Nogueira* v. *N. Y., N. H. & H. R. Co.*, 281 U. S. 128, 138) and the general authority of the Congress to alter or revise the maritime law which shall prevail throughout the country is beyond dispute.[2] In limiting the ap-

[2]Waring *v.* Clarke, 5 How. 441, 457, 458; The Lottawanna, 21 Wall. 558, 577; Butler *v.* Boston & Savannah Steamship Co., 130 U. S. 527, 556, 557; In re Garnett, 141 U. S. 1, 14; The Hamilton, 207 U. S. 398, 404; Atlantic Transport Co. *v.* Imbrovek, 234 U. S. 52, 62; Southern Pacific Co. *v.* Jensen, 244 U. S. 205, 214, 215; Knickerbocker Ice Co. *v.* Stewart, 253 U. S. 149, 160; Washington *v.* Dawson, 264 U. S. 219, 227, 228; Panama R. R. Co. *v.* Johnson, 264 U. S. 375, 386, 388.

Important illustrations of the exercise of this authority are the Limitation of Liability Act of 1851 (9 Stat. 151; Hartford Accident & Indemnity Co. *v.* Southern Pacific Co., 273 U. S. 207, 213-215); the Seamen's Act of 1915 (38 Stat. 1185; Chelentis *v.* Luckenbach Steamship Co., 247 U. S. 372, 381, 384); the Ship Mortgage Act of 1920 (41 Stat. 1000; Morse Drydock & Repair Co. *v.* North Star, 271 U. S. 552, 555, 556); and the Merchant Marine Act of 1920, incorporating, in relation to seamen, the Federal Employers' Liability Act into the maritime law of the United States (41 Stat. 1007; Panama R. R. Co. *v.* Johnson, *supra;* Engel *v.* Davenport, 271 U. S. 33, 35; Panama R. R. Co. *v.* Vasquez, 271 U. S. 557, 559, 560; Northern Coal Co. *v.* Strand, 278 U. S. 142, 147). See U. S. C., Titles 33 and 46.

plication of the Act to cases where recovery "through workmen's compensation proceedings may not validly be provided by State law", the Congress evidently had in view the decisions of this Court with respect to the scope of the exclusive authority of the national legislature.[3] The propriety of providing by Federal statute for compensation of employees in such cases had been expressly recognized by this Court,[4] and within its sphere the statute was designed to accomplish the same general purpose as the workmen's compensation laws of the States.[5] In defining substantive rights, the Act provides for recovery in the absence of fault, classifies disabilities resulting from injuries, fixes the range of compensation in case of disability or death, and designates the classes of beneficiaries. In view of Federal power to alter and revise the maritime law, there appears to be no room for objection on constitutional grounds to the creation of these rights, unless it can be found in the due process clause of the Fifth Amendment. But it cannot be said that either the classifications of the statute or the extent of the compensation provided are unreasonable. In view of the difficulties which inhere in the ascertainment of actual dam-

[3]Southern Pacific Co. *v.* Jensen, 244 U. S. 205; Knickerbocker Ice Co. *v.* Stewart, 253 U. S. 149; Washington *v.* Dawson, 264 U. S. 219; Robins Dry Dock & Repair Co. *v.* Dahl, 266 U. S. 449. For decisions since the passage of the Act in question, see Messel *v.* Foundation Co., 274 U. S. 427; Northern Coal & Dock Co. *v.* Strand, 278 U. S. 142; London Guarantee & Accident Co. *v.* Industrial Commission, 279 U. S. 109, 125; Baizley Iron Works *v.* Span, 281 U. S. 222.

The application of State Workmen's Compensation Acts has been sustained where the work of the employee has been deemed to have no direct relation to navigation or commerce and the operation of the local law "would work no material prejudice to the essential features of the general maritime law". Western Fuel Co. *v.* Garcia, 257 U. S. 233, 242; Grant Smith-Porter Co. *v.* Rohde, 257 U. S. 469, 477; Millers' Indemnity Underwriters *v.* Braud, 270 U. S. 59, 64; Sultan Railway & Timber Co. *v.* Department of Labor, 277 U. S. 135, 137; Baizley Iron Works *v.* Span, supra, at pp. 230, 231. See, also, Red Cross Line *v.* Atlantic Fruit Co., 264 U. S. 109.

[4]Washington *v.* Dawson, 264 U. S. 219, 227, where the Court said "Without doubt Congress has power to alter, amend or revise the maritime law by statutes of general application embodying its will and judgment. This power, we think, would permit enactment of a general employers' liability law or general provisions for compensating injured employees; but it may not be delegated to the several States".

[5]The Committee on the Judiciary of the Senate, in reporting upon the proposed measure, said (Sen. Rep. No. 973, 69th Cong., 1st sess., p. 16):

ages, the Congres was entitled to provide for the payment of amounts which would reasonably approximate the probable damages. See *Chicago, B. & Q. R. Co.* v. *Kyle*, 228 U. S. 70, 84; compare *Missouri Pacific Rwy. Co.* v. *Tucker*, 230 U. S. 346, 348. Liability without fault is not unknown to the maritime law,[6] and, apart from this fact, considerations are applicable to the substantive provisions of this legislation, with respect to the relation of master and servant, similar to those which this Court has found sufficient to sustain workmen's compensation laws of the States

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"The committee deems it unnecessary to comment upon the modern change in the relation between employers and employees establishing systems of compensation as distinguished from liability. Nearly every State in the Union has a compensation law through which employees are compensated for injuries occurring in the course of their employment without regard to negligence on the part of the employer or contributory negligence on the part of the employee. If longshoremen could avail themselves of the benefits of State compensation laws, there would be no occasion for this legislation; but, unfortunately, they are excluded from these laws by reason of the character of their employment; and they are not only excluded but the Supreme Court has more than once held that Federal legislation can not, constitutionally, be enacted that will apply State laws to this occupation. (Southern Pacific Co. v. Jensen, 244 U. S. 205; Knickerbocker Ice Co. v. Stewart, 253 U. S. 149; Washington v. Dawson & Co., 264 U. S. 219.)"

The House Committee in its report made the following statement (House Rep. No. 1767, 69th Cong., 2d sess., p. 20):

"The principle of workmen's compensation has become so firmly established that simple justice would seem to require that this class of maritime workers should be included in this legislation. . . .

"The bill as amended, therefore, will enable Congress to discharge its obligation to the maritime workers placed under their jurisdiction by the Constitution of the United Staes by providing for them a law whereby they may receive the benefits of workmen's compensation and thus afford them the same remedies that have been provided by legislation for those killed or injured in the course of their employment in nearly every State in the Union".

[6] See, *e. g.*, The Osceola, 189 U. S. 158, 169; The Iroquois, 194 U. S. 240, 241, 242. In Chicago, R. I. & P. R. Co. v. Zernecke, 183 U. S. 582, 586, the Court said: "Our jurisprudence affords examples of legal liability without fault, and the deprivation of property without fault being attributable to its owner. The law of deodands was such an example. The personification of the ship in admiralty law is another." See Holmes, "The Common Law," pp. 26-29; The China, 7 Wall. 53, 67, 68; Sherlock v. Alling, 93 U. S. 99, 105-108; Homer Ramsdell Co. v. Compagnie Générale Transatlantique, 182 U. S. 406, 413, 414. As to the basis of general average contribution, see Ralli v. Troop, 157 U. S. 386, 394, 395.

against objections under the due process clause of the Fourteenth Amendment. *New York Central R. R. Co.* v. *White*, 243 U. S. 188; *Mountain Timber Company* v. *Washington*, 243 U. S. 219; *Ward & Gow* v. *Krinsky*, 259 U. S. 503; *Lower Vein Coal Company* v. *Industrial Board*, 255 U. S. 144; *Madera Sugar Pine Company* v. *Industrial Accident Commission*, 262 U. S. 499, 501, 502; *Sheehan Company* v. *Shuler*, 265 U. S. 371; *Dahlstrom Metallic Door Company* v. *Industrial Board*, decided January 18, 1932. See *Nogueira* v. *N. Y., N. H. & H. R. Co., supra*, at pp. 136, 137.

Second. The objections to the procedural requirements of the Act relate to the extent of the administrative authority which it confers. The administration of the Act—'except as otherwise specifically provided'—was given to the United States Employees' Compensation Commission,[1] which was authorized to establish compensation districts, appoint deputy commissioners, and make regulations. Secs. 39, 40. Claimants must give written notice to the deputy commissioner and to the employer of the injury or death within thirty days thereafter; the deputy commissioner may excuse failure to give such notice for satisfactory reasons. Sec. 12. If the employer contests the right to compensation, he is to file notice to that effect. Sec. 14 (d). A claim for compensation must be filed with the deputy commissioner within a prescribed period, and it is provided that the deputy commissioner shall have full authority to hear and determine all questions in respect to the claim. Secs. 13, 19 (a). Within ten days after the claim is filed, the deputy commissioner, in accordance with regulations prescribed by the Commission, must notify the employer and any other person who is considered by the deputy commissioner to be an interested party. The deputy commissioner is required to make, or cause to be made, such investigations as he deems to be necessary and upon application of any interested party must order a hearing, upon notice, at which the claimant and the employer may present evidence. Employees claiming compensation must submit to medical examination. Sec. 19. In conducting investigations and hearings, the deputy commissioner is not bound by common law or statutory rules of evidence, or by technical or formal rules or procedure, except as the Act provides, but he is to proceed in such manner

[1]This Commission was created by the Act of September 7, 1916, c. 458, sec. 28, 39 Stat. 748; U. S. C., Tit. 5, sec. 778).

"as to best ascertain the rights of the parties." Sec. 23 (a). He may issue subpoenas, administer oaths, compel the attendance and testimony of witnesses, the production of documents or other evidence or the taking of depositions, and may do all things conformable to law which may be necessary to enable him effectively to discharge his duties. Proceedings may be brought before the appropriate Federal court to punish for misbehavior or contumacy as in case of contempt. Sec. 27. Hearings before the deputy commissioner are to be public and reported stenographically and the Commission is to provide by regulation for the preparation of a record. Sec. 23 (b)[8]. Compensation orders are to be filed in the office of the deputy commissioner, and copies must be sent to the claimant and employer. Sec. 19. The Act provides that it shall be presumed, in the absence of substantial evidence to the contrary, that the claim comes within the provisions of the Act, that sufficient notice of claim has been given, that the injury was not occasioned solely by the intoxication of the injured employee, or by the willful intention of such employee to injure or kill himself or another. Sec. 20. A compensation order becomes effective when filed, and unless proceedings are instituted to suspend it or set it aside, it becomes final at the expiration of thirty days. Sec. 21 (a). If there is a change in conditions, the order may be modified or a new order made. Sec. 22. In case of default for thirty days in the payment of compensation, application may be made to the deputy commissioner for a supplementary order declaring the amount in default. Such an order is to be made after investigation, notice and hearing, as in the case of claims. Upon filing a certified copy of the supplementary order with the clerk of the Federal court, as stated, judgment is to be entered for the amount declared in default, if such supplementary order "is in accordance with law." Review of the judgment may be had as in civil suits for damages at common law and the judgment may be enforced by writ of execution. Sec. 18.

The Act further provides that if a compensation order is "not in accordance with law", it "may be suspended or set aside, in

[8]In the regulations promulgated by the Commission in the form of instructions to deputy commissioners, provision was made for findings of fact. Report, United States Employees' Compensation Commission, for fiscal year ending June 30, 1930, p. 64. See Howard v. Monahan, 33 F. (2d) 220.

whole or in part, through injunction proceedings, mandatory or otherwise, brought by any party in interest" against the deputy commissioner making the order and instituted in the Federal district court for the judicial district in which the injury occurred.[9] Payment is not to be stayed pending such proceedings unless, on hearing after notice, the court allows the stay on evidence showing that the employer would otherwise suffer irreparable damage. Sec. 21 (b). Beneficiaries of awards or the deputy commissioner may apply for enforcement to the Federal district court and, if the court determines that the order "was made and served in accordance with law", obedience may be compelled by writ of injunction or other proper process. Sec. 21 (c)[10].

As the claims which are subject to the provisions of the Act are governed by the maritime law as established by the Congress and are within the admiralty jurisdiction, the objection raised by the respondent's pleading as to the right to a trial by jury under the Seventh Amendment is unavailing (*Waring* v. *Clarke*, 5 How. 441, 459, 460) and that under the Fourth Amendment is neither explained nor urged. The other objections as to procedure invoke the due process clause and the provision as to the judicial power of the United States.

(1.) The contention under the due process clause of the Fifth Amendment relates to the determination of questions of fact. Rulings of the deputy commissioner upon questions of law are

[9]In the District of Columbia, the proceedings are to be instituted in the Supreme Court of the District.

[10]The United States Employees' Compensation Commission estimates that the number of employees who at times are engaged in employments covered by the Act is in excess of 300,000. Report for fiscal year ending June 30, 1931, p. 66. The Commission states that 138,788 cases have been closed during the four years that the law has been in operation. *Id.*, p. 69. During the last fiscal year the injuries reported under the Act numbered 28,861, of which 156 were 'fatal' cases. The total number of cases disposed of during that year, including those brought forward from the preceding years, was 30,489, of which there were 13,261 'non-fatal' cases which caused no loss of time, and 4,067 of such cases in which the duration of disability did not exceed seven days. Compensation payments were completed in 11,776 cases. Hearings held by deputy commissioners during the fiscal year number 1217, of which 905 involved compensation payments. At the end of the fiscal year, there were 102 cases pending in Federal district courts wherein the plaintiffs asked review of compensation orders. *Id.*, 68-70.

without finality. So far as the latter are concerned, full opportunity is afforded for their determination by the Federal courts through proceedings to suspend or to set aside a compensation order (Sec. 21 (b)), by the requirement that judgment is to be entered on a supplementary order declaring default only in case the order follows the law (Sec. 18), and by the provision that the issue of injunction or other process in a proceeding by a beneficiary to compel obedience to a compensation order is dependent upon a determination by the court that the order was lawfully made and served (Sec. 21 (c)). Moreover, the statute contains no express limitation attempting to preclude the court, in proceedings to set aside an order as not in accordance with law, from making its own examination and determination of facts whenever that is deemed to be necessary to enforce a constitutional right properly asserted. See *Ohio Valley Water Company* v. *Ben Avon Borough*, 253 U. S. 287, 289; *Ng Fung Ho.* v. *White*, 259 U. S. 276, 284, 285; *Prendergast* v. *New York Telephone Co.*, 262 U. S. 43, 50; *Tagg Bros. & Moorhead* v. *United States*, 280 U. S. 420, 443, 444; *Phillips* v. *Commissioner*, 283 U. S. 589, 600. As the statute is to be construed so as to support rather than to defeat it, no such limitation is to be implied. *Panama Railroad Co.* v. *Johnson*, 264 U. S. 375, 390.

Apart from cases involving constitutional rights to be appropriately enforced by proceedings in court, there can be no doubt that the Act contemplates that as to questions of fact, arising with respect to injuries to employees within the purview of the Act, the findings of the deputy commissioner, supported by evidence and within the scope of his authority, shall be final. To hold otherwise would be to defeat the obvious purpose of the legislation to furnish a prompt, continuous, expert and inexpensive method for dealing with a class of questions of fact which are peculiarly suited to examination and determination by an administrative agency specially assigned to that task. The object is to secure within the prescribed limits of the employer's liability an immediate investigation and a sound practical judgment, and the efficacy of the plan depends upon the finality of the determinations of fact with respect to the circumstances, nature, extent and consequences of the employee's injuries and the amount of compensation that should be awarded. And this finality may also be

regarded as extending to the determination of the question of fact whether the injury "was occasioned solely by the intoxication of the employee or by the willful intention of the employee to injure or kill himself or another". While the exclusion of compensation in such cases is found in what are called "coverage" provisions of the Act (Sec. 3), the question of fact still belongs to the contemplated routine of administration, for the case is one of employment within the scope of the Act and the cause of the injury sustained by the employee as well as its character and effect must be ascertained in applying the provisions for compensation. The use of the administrative method for these purposes, assuming due notice, proper opportunity to be heard, and that findings are based upon evidence, falls easily within the principle of the decisions sustaining similar procedure against objections under the due process clauses of the Fifth and Fourteenth Amendments.[11]

The statute provides for notice and hearing, and an award made without proper notice, or suitable opportunity to be heard, may be attacked and set aside as without validity. The objection is made that, as the deputy commissioner is authorized to prosecute such inquiries as he may consider necessary, the award may be based wholly or partly upon an *ex parte* investigation and upon unknown sources of information, and that the hearing may be merely a formality. The statute, however, contemplates a public hearing and regulations are to require "a record of the hearings and other proceedings before the deputy commissioner". Sec. 23 (b). This implies that all proceedings by the deputy commissioner upon a particular claim shall be appropriately set forth, and that whatever facts he may ascertain and their sources shall be shown in the record and be open to challenge and opposing evidence. Facts conceivably known to the deputy commissioner, but not put in

[11]Long Island Water Supply Co. *v.* Brooklyn, 166 U. S. 685, 695; Crane *v.* Hahlo, 258 U. S. 142, 147; Federal Trade Commission *v.* Curtis Publishing Co., 260 U. S. 568, 580; Silberschein *v.* United States, 266 U. S. 221, 225; Virginian Railway Co. *v.* United States, 272 U. S. 658, 663; Tagg Bros. & Moorhead *v.* United States, 280 U. S. 420, 442; International Shoe Co. *v.* Federal Trade Commission, 280 U. S. 291, 297; Dohany *v.* Rogers, 281 U. S. 362, 369; Phillips *v.* Commissioner, 283 U. S. 589, 600. See, also, Hardware Dealers Mutual Fire Insurance Co. *v.* Glidden, decided November 23, 1931; New York Central R. R. Co. *v.* White, *supra*, at pp. 194, 207, 208; Mountain Timber Co. *v.* Washington, *supra*, at p. 233.

evidence so as to permit scrutiny and contest, will not support a compensation order. *Interstate Commerce Commission* v. *Louisville & Nashville R. R. Co.*, 227 U. S. 88, 93; *The Chicago Junction Case*, 264 U. S. 258, 263; *United States* v. *Abilene & Southern Railway Co.*, 265 U. S. 274, 288. An award not supported by evidence in the record is not in accordance with law. But the fact that the deputy commissioner is not bound by the rules of evidence which would be applicable to trials in court or by technical rules of procedure (Sec. 23 (a)) does not invalidate the proceeding, provided substantial rights of the parties are not infringed. *Interstate Commerce Commission* v. *Baird*, 194 U. S. 25, 44; *Interstate Commerce Commission* v. *Louisville & Nashville R. R. Co., supra; Spiller* v. *Atchison, T. & S. F. Ry. Co.*, 253 U. S. 117, 131; *United States* v. *Abilene & Southern Railway Co., supra; Tagg Bros. & Moorhead* v. *United States, supra*, at p. 442.

(2.) The contention based upon the judicial power of the United States, as extended "to all cases of admiralty and maritime jurisdiction" (Const, Art. III), presents a distinct question. In *Murray's Lessee* v. *Hoboken Land and Improvement Company* (18 How. 272, 284) this Court, speaking through Mr. Justice Curtis, said: "To avoid misconstruction upon so grave a subject, we think it proper to state that we do not consider congress can either withdraw from judicial cognizance any matter which, from its nature, is the subject of a suit at the common law, or in equity, or admiralty; nor, on the other hand, can it bring under the judicial power a matter which, from its nature, is not a subject for judicial determination."

The question in the instant case, in this aspect, can be deemed to relate only to determinations of fact. The reservation of legal questions is to the same court that has jurisdiction in admiralty, and the mere fact that the court is not described as such is unimportant. Nor is the provision for injunction proceedings (Sec. 21(b)) open to objection. The Congress was at liberty to draw upon another system of procedure to equip the court with suitable and adequate means for enforcing the standards of the maritime law as defined by the Act. *The Geneses Chief*, 12 How. 443, 459, 460. Compare *Panama R. R. Co.* v. *Johnson, supra*, at p. 388. By statute and rules, courts of admiralty may be empowered to grant injunctions, as in the case of limitation of liability proceedings. *Hart-*

ford Accident & Indemnity Co. v. *Southern Pacific Co.*, 273 U. S. 207, 218. See, also, *Marine Transit Corporation* v. *Dreyfus*, decided January 4, 1932. The Congress did not attempt to define questions of law, and the generality of the description leaves no doubt of the intention to reserve to the Federal court full authority to pass upon all matters which this Court had held to fall within that category. There is thus no attempt to interfere with, but rather provision is made to facilitate, the exercise by the court of its jurisdiction to deny effect to any administrative finding which is without evidence, or 'contrary to the indisputable character of the evidence', or where the hearing is 'inadequate', or 'unfair', or arbitrary in any respect. *Interstate Commerce Commission* v. *Louisville R. R. Co., supra,* at pp. 91, 92; *Tagg Bros. & Moorhead* v. *United States, supra.*

As to determinations of fact, the distinction is at once apparent between cases of private right and those which arise between the Government and persons subject to its authority in connection with the performance of the constitutional functions of the executive or legislative departments. The Court referred to this distinction in *Murray's Lessee* v. *Hoboken Land and Improvement Company, supra,* pointing out that "there are matters, involving public rights, which may be presented in such form that the judicial power is capable of acting on them, and which are susceptible of judicial determination, but which congress may or may not bring within the cognizance of the courts of the United States, as it may deem proper." Thus the Congress, in exercising the powers confided to it, may establish 'legislative' courts (as distinguished from 'constitutional courts in which the judicial power conferred by the Constitution can be deposited') which are to form part of the government of territories or of the District of Columbia,[12] or to serve as special tribunals "to examine and determine various matters, arising between the government and others, which from their nature do not require judicial determination and yet are susceptible of it." But "the mode of determining matters of this class is completely within congressional control. Congress may reserve to itself the power to decide, may delegate that power

[12]American Insurance Co. v. Canter, 1 Pet. 511, 546; Keller v. Potomac Electric Power Co., 261 U. S. 428, 442-444; Postum Cereal Co. v. California Fig Nut Co., 272 U. S. 693, 700.

to executive officers, or may commit it to judicial tribunals." *Ex parte Bakelite Corporation*, 279 U. S. 438, 451. Familiar illustrations of administrative agencies created for the determination of such matters are found in connection with the exercise of the congressional power as to interstate and foreign commerce, taxation, immigration, the public lands, public health, the facilities of the post office, pensions and payments to veterans.[13]

The present case does not fall within the categories just described but is one of private right, that is, of the liability of one individual to another under the law as defined. But in cases of that sort, there is no requirement that, in order to maintain the essential attributes of the judicial power, all determinations of fact in constitutional courts shall be made by judges. On the common law side of the Federal courts, the aid of juries is not only deemed appropriate but is required by the Constitution itself. In cases of equity and admiralty, it is historic practice to call to the assistance of the courts, without the consent of the parties, masters and commissioners or assessors, to pass upon certain classes of questions, as, for example, to take and state an account or to find the amount of damages. While the reports of masters and commissioners in such cases are essentially of an advisory nature, it has not been the practice to disturb their findings when they are properly based upon evidence, in the absence of errors of law,[14] and the parties have no right to demand that the court shall redetermine the facts thus found. In admiralty, juries were

[13] Virginian Railway Co. *v.* United States, *supra;* Tagg Bros. & Moorhead *v.* United States, *supra;* International Shoe Co. *v.* Federal Trade Commission, *supra;* Phillips *v.* Commissioner, *supra;* United States *v.* Ju Toy, 198 U. S. 253, 263; United States *v.* Babcock, 250 U. S. 328, 331; Burfenning *v.* Chicago, St. Paul, etc. Rwy. Co., 163 U. S. 321, 323; Bates & Guild Co. *v.* Payne, 194 U. S. 106, 109; Houston *v.* St. Louis Packing Co., 249 U. S. 479, 484; Passavant *v.* United States, 148 U. S. 214, 219; Silberschein *v.* United States, 266 U. S. 221, 225.

[14] As to masters in chancery, see Tilghman *v.* Proctor, 125 U. S. 136, 149, 150; Callaghan *v.* Myers, 128 U. S. 617, 666, 667; Kimberly *v.* Arms, 129 U. S. 512, 523, 524; Davis *v.* Schwartz, 155 U. S. 631, 636.

As to commissioners in admiralty, see The Cayuga, (C. C. A. 6th), 59 Fed. 483, 488; La Bourgogne (C. C. A. 2nd), 144 Fed. 781, 782, 783; The North Star (C. C. A. 2nd), 151 Fed. 168, 177; Western Transit Co. *v.* Davidson S. S. Co. (C. C. A. 6th), 212 Fed. 696, 701; P. Sanford Ross, Inc. *v.* Public Service Corporation (C. C. A. 3d), 42 Fed. (2d) 79, 80.

anciently in use not only in criminal cases but apparently in civil cases also.[15] The Act of February 26, 1845 (c. 20, 5 Stat. 726), purporting to extend the admiralty jurisdiction of the Federal district courts to certain cases arising on the Great Lakes, gave the right "to trial by jury of all facts put in issue in such suits, where either party shall require it." After the decision in the case of *The Genesee Chief, supra,* holding that the Federal district courts possessed general jurisdiction in admiralty over the lakes, and navigable waters connecting them, under the Constitution and the Judiciary Act of 1789 (c. 20, sec. 9, 1 Stat. pp. 76, 77), this Court regarded the enabling Act of 1845 as "obsolete and of no effect, with the exception of the clause which gives to either party the right of trial by jury when requested." *The Eagle,* 8 Wall. 15, 25. And this provision, the court said, was "rather a mode of exercising jurisdiction than any substantial part of it." See R. S. 566, U. S. C., Tit. 28, sec. 770.[16] Chief Justice Taney, in delivering the opinion of the Court in the case of *The Genesee Chief, supra,* referring to this requirement, thus broadly stated the authority of Congress to change the procedure in courts of admiralty.

"The power of Congress to change the mode of proceeding in this respect in its courts of admiralty, will, we suppose, hardly be questioned. The Constitution declares that the judicial power of the United States shall extend to 'all cases of admiralty and maritime jurisdiction'. But it does not direct that the court shall proceed according to ancient and established forms, or shall adopt any other form or mode of practice. The grant defines the subjects to which the jurisdiction may be extended by Congress. But the extent of the power as well as the mode of proceeding in which that jurisdiction is to be exercised, like the power and practice in all the other courts of the United States, are subject to the regulation of Congress, except where that power is limited by the terms of the Constitution, or by necessary implication from its language. In admiralty and maritime cases there is no such limitation as to the mode of proceeding, and Congress may therefore in cases of that description, give either party right of trial by jury, or modify

[15] 4 Chr. Robinson's Admiralty Reports, p. 74, note; Black Book of the Admiralty, Twiss' ed., vol. 1, pp. 49, 53, 245; 1 Abbott on Shipping, 5th Am. ed., pp. 283, 284; 1 Benedict's Admiralty, 5th ed., p. 304, note.

[16] As to the effect of the verdict of the jury in such cases, see The Western States, 159 Fed. 354, 358, 359; Sweeting *v.* The Western States, 210 U. S. 433; The Nyack, 199 Fed. 383, 389; 1 Benedict's Admiralty, 5th ed., p. 305.

the practice of the court in any other respect that it deems more conducive to the administration of justice."

It may also be noted that while on an appeal in admiralty cases "the facts as well as the law would be subjected to review and retrial," this Court has recognized the power of the Congress "to limit the effect of an appeal to a review of the law as applicable to facts finally determined below". *The Francis Wright,* 105 U. S. 381, 386; *The Connemara,* 108 U. S. 352, 359. Compare *Luckenbach S. S. Co.* v. *United States,* 272 U. S. 533, 536, 537.

In deciding whether the Congress, in enacting the statute under review, has exceeded the limits of its authority to prescribe procedure in cases of injury upon navigable waters, regard must be had, as in other cases where constitutional limits are invoked, not to mere matters of form but to the substance of what is required. The statute has a limited application, being confined to the relation of master and servant, and the method of determining the questions of fact, which arise in the routine of making compensation awards to employees under the Act, is necessary to its effective enforcement. The Act itself, where it applies, establishes the measure of the employer's liability, thus leaving open for determination the questions of fact as to the circumstances, nature, extent and consequences of the injuries sustained by the employee for which compensation is to be made in accordance with the prescribed standards. Findings of fact by the deputy commissioner upon such questions are closely analogous to the findings of the amount of damages, that are made according to familiar practice by commissioners or assessors, and the reservation of full authority to the court to deal with matters of law provides for the appropriate exercise of the judicial function in this class of cases. For the purposes stated, we are unable to find any constitutional obstacle to the action of the Congress in availing itself of a method shown by experience to be essential in order to apply its standards to the thousands of cases involved, thus relieving the courts of a most serious burden while preserving their complete authority to insure the proper application of the law.

(3). What has been said thus far relates to the determination of claims of employees within the purview of the Act. A different question is presented where the determinations of fact are funda-

mental or 'jurisdictional',[17] in the sense that their existence is a condition precedent to the operation of the statutory scheme. These fundamental requirements are that the injury occurs upon the navigable waters of the United States and that the relation of master and servant exists. These conditions are indispensable to the application of the statute, not only because the Congress has so provided explicitly (Sec. 3), but also because the power of the Congress to enact the legislation turns upon the existence of these conditions.

In amending and revising the maritime law,[18] the Congress cannot reach beyond the constitutional limits which are inherent in the admiralty and maritime jurisdiction.[19] Unless the injuries to which the Act relates occur upon the navigable waters of the United States, they fall outside that jurisdiction.[20] Not only is navigability itself a question of fact, as waters that are navigable in fact are navigable in law,[21] but, where navigability is not in dispute, the locality of the injury, that is, whether it has occurred upon the navigable waters of the United States, determines the existence of the congressional power to create the liability prescribed by the statute.[22] Again, it cannot be maintained that the

[17]The term 'jurisdictional', although frequently used, suggests analogies which are not complete when the reference is to administrative officials or bodies. See Interstate Commerce Commission *v.* Humboldt Steamship Co., 224 U. S. 474, 484. In relation to administrative agencies, the question in a given case is whether it falls within the scope of the authority validly conferred.

[18]This power is distinct from the authority to regulate interstate or foreign commerce and is not limited to cases arising in that commerce. The Genesee Chief, 12 How. 443, 452; The Commerce, 1 Black 574, 578, 579; The Belfast, 7 Wall. 624, 640, 641; Ex parte Boyer, 109 U. S. 629, 632; In re Garnett, 141 U. S. 1, 15, 17; London Guarantee & Accident Co. *v.* Industrial Commission, 279 U. S. 109, 124.

[19]The Belfast, *supra;* Panama R. R. Co. *v.* Johnson, *supra;* The Genesee Chief, *supra,* at p. 459; 1 Benedict's Admiralty, 5th ed., sec. 32, p. 47.

[20]Cleveland Terminal R. R. Co. *v.* Cleveland Steamship Co., 208 U. S. 316; Atlantic Transport Co. *v.* Imbrovek, *supra,* at pp. 59, 60; Industrial Commission *v.* Nordenholt Co., 259 U. S. 263, 273; Washington *v.* Dawson, *supra,* at pp. 227, 235; Nogueira *v.* N. Y., N. H. & H. R. Co., 281 U. S. 128, 133, 138.

[21]The Daniel Ball, 10 Wall. 557, 563; United States *v.* Holt State Bank, 270 U. S. 49, 56; United States *v.* Utah, 283 U. S. 64, 76, 77; Arizona *v.* California, 283 U. S. 423, 452.

[22]Industrial Commission *v.* Nordenholt Co., *supra;* Washington *v.* Dawson, *supra;* Nogueira *v.* N. Y., N. H. & H. R. Co., *supra;* 1 Benedict's Admiralty, 5th ed., sec. 29, pp. 41, 42, note.

Congress has any general authority to amend the maritime law so as to establish liability without fault in maritime cases regardless of particular circumstances or relations. It is unnecessary to consider what circumstances or relations might permit the imposition of such a liability by amendment of the maritime law, but it is manifest that some suitable selection would be required. In the present instance, the Congress has imposed liability without fault only where the relation of master and servant exists in maritime employment and, while we hold that the Congress could do this, the fact of that relation is the pivot of the statute and, in the absence of any other justification, underlies the constitutionality of this enactment. If the person injured was not an employee of the person sought to be held, or if the injury did not occur upon the navigable waters of the United States, there is no ground for an assertion that the person against whom the proceeding was directed could constitutionally be subjected, in the absence of fault upon his part, to the liability which the statute creates.

In relation to these basic facts, the question is not the ordinary one as to the propriety of provision for administrative determinations. Nor have we simply the question of due process in relation to notice and hearing. It is rather a question of the appropriate maintenance of the Federal judicial power in requiring the observance of constitutional restrictions. It is the question whether the Congress may substitute for constitutional courts, in which the judicial power of the United States is vested, an administrative agency—in this instance a single deputy commissioner[23]—for the final determination of the existence of the facts upon which the enforcement of the constitutional rights of the citizen depend. The recognition of the utility and convenience of administrative agencies for the investigation and finding of facts within their proper province, and the support of their authorized action, does not require the conclusion that there is no limitation of their use, and that the Congress could completely oust the courts of all determinations of fact by vesting the authority to make them with finality in its own instrumentalities or in the Executive Department. That would be to sap the judicial power as it exists under the Federal Constitution, and to establish a government of a

[23]See Report of United States Employees' Compensation Commission for fiscal year ending June 30, 1931, pp. 108, 109.

bureaucratic character alien to our system, wherever fundamental rights depend, as not infrequently they do depend, upon the facts, and finality as to facts becomes in effect finality in law.

In this aspect of the question, the irrelevancy of State statutes and citations from State courts as to the distribution of State powers is apparent. A State may distribute its powers as it sees fit, provided only that it acts consistently with the essential demands of due process and does not transgress those restrictions of the Federal Constitution which are applicable to State authority.[24] In relation to the Federal government, we have already noted the inappositeness to the present inquiry of decisions with respect to determinations of fact, upon evidence and within the authority conferred, made by administrative agencies which have been created to aid in the performance of governmental functions, and where the mode of determination is within the control of the Congress; as, *e. g.* in the proceedings of the Land Office pursuant to provisions for the disposition of public lands, of the authorities of the Post Office in relation to postal privileges, of the Bureau of Internal Revenue with respect to taxes, and of the Labor Department as to the admission and deportation of aliens. *Ex parte Bakelite Corporation, supra.*[25] Similar considerations apply to decisions with respect to determinations of fact by boards and commissions created by the Congress to assist it in its legislative process in governing various transactions subject to its authority, as for example, the rates and practices of interstate carriers, the legislature thus being able to apply its standards to a host of instances which it is impracticable to consider and legislate upon directly and the action being none the less legislative in character because taken through a subordinate body.[26] And where administrative bodies have been appropriately created to meet the exigencies of certain classes of cases and their action is of a judicial character,

[24]Prentis *v.* Atlantic Coast Line, 211 U. S. 210, 225; Chicago, Rock Island & Pacific Rwy. Co. *v.* Cole, 251 U. S. 54, 56; Missouri *ex rel.* Hurwitz *v.* North, 271 U. S. 40, 42.

[25]*Supra*, note 13.

[26]See Arizona Grocery Co. *v.* Atchison, Topeka & Santa Fe Ry. Co., decided January 4, 1932.

the question of the conclusiveness of their administrative findings of fact generally arises where the facts are clearly not jurisdictional[27] and the scope of review as to such facts has been determined by the applicable legislation. None of the decisions of this sort touch the question which is presented where the facts involved are jurisdictional[28] or where the question concerns the proper exercise of the judicial power of the United States in enforcing constitutional limitations.

Even where the subject lies within the general authority of the Congress, the propriety of a challenge by judicial proceedings of the determinations of fact deemed to be jurisdictional, as underlying the authority of executive officers, has been recognized. When proceedings are taken against a person under the military law, and enlistment is denied, the issue has been tried and determined *de novo* upon *habeas corpus*. *In re Grimley*, 137 U. S. 147, 154, 155. See, also, *In re Morrissey*, 137 U. S. 157, 158; *Givens* v. *Zerbst*, 255 U. S. 11, 20. While in the administration of the public land system, questions of fact are for the consideration and judgment of the Land Department and its decision of such questions is conclusive, it is equally true that if lands "never were public property, or had previously been disposed of, or if Congress had made no provision for their sale, or had reserved them, the department would have no jurisdiction to transfer them." This Court has held that "matters of this kind, disclosing a want of jurisdiction, may be considered by a court of law. In such cases the objection to the patent reaches beyond the action of the special tribunal, and goes to the existence of a subject upon which it was competent to act." *Smelting Company* v. *Kemp*, 104 U. S. 636, 641. In such a case, the invalidity of the patent may be shown in a collateral proceeding. *Polk's Lessee* v. *Wendell*, 9 Cranch. 87; *Patterson* v. *Winn*, 11 Wheat. 380; *Minter* v. *Crommelin*, 18 How. 87; *Morton* v. *Nebraska*, 21 Wall. 660, 675; *Noble* v. *Union River Logging Railroad*, 147 U. S. 165, 174. The question whether a publication is a 'book' or a 'periodical' has been reviewed upon the evidence received in a suit brought to restrain the Postmaster General from acting beyond his authority in excluding the publi-

[27] Freund, "Administrative Powers Over Persons and Property", sec. 154, p. 293.

[28] *Id.*, sec. 153, pp. 291-293.

cation from carriage as second class mail matter. *Smith* v. *Hitchcock*, 34 App. D. C., 521, 530-533; 226 U. S. 54, 59.[29]

In cases brought to enforce constitutional rights, the judicial power of the United States necessarily extends to the independent determination of all questions, both of fact and law, necessary to the performance of that supreme function. The case of confiscation is illustrative, the ultimate conclusion almost invariably depending upon the decisions of questions of fact. This court has held the owner to be entitled to "a fair opportunity for submitting that issue to a judicial tribunal for determination upon its own independent judgment as to both law and facts". *Ohio Valley Water Company* v. *Ben Avon Borough, supra.* See, also, *Prendergast* v. *New York Telephone Company*, 262 U. S. 43, 50; *Tagg Bros. & Moorhead* v. *United States, supra; Phillips* v. *Commissioner*, 283 U. S. 580, 600. Jurisdiction in the Executive to order deportation exists only if the person arrested is an alien, and while, if there were jurisdiction, the findings of fact of the Executive Department would be conclusive, the claim of citizenship "is a denial of an essential jurisdictional fact" both in the statutory and the constitutional sense, and a writ of *habeas corpus* will issue "to determine the status." Persons claiming to be citizens of the United States "are entitled to a judicial determination of their claims," said this Court in *Ng Fung Ho* v. *White, supra* (at p. 285), and in that case the cause was remanded to the Federal District Court "for trial in that court of the question of citizenship."

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[29] Where the doctrine of personal liability of an officer for acting without jurisdiction is applied, courts have received evidence to show the jurisdictional defect. Thus in Miller *v.* Horton, 152 Mass. 540, an action was brought against the members of a town board of health who had killed a horse in obedience to an order of the commissioners on contagious diseases among domestic animals, acting under the alleged authority of the state legislature. The order recited that the animal had been examined and was adjudged to have the glanders. The judge before whom the case was tried "found the horse had not the glanders" but declined to rule against the defendants. The Supreme Judicial Court sustained exceptions, holding that "The fact as to the horse having the disease was open to investigation in the present action, and on the finding that the horse did not have it, the plaintiff was entitled to a ruling that the defendants had failed to make out their justification." *Id.*, p. 548. See, also, Pearson *v.* Zehr, 138 Ill. 48, 51, 52.

In the present instance, the argument that the Congress has constituted the deputy commissioner a fact-finding tribunal is unavailing, as the contention makes the untenable assumption that the constitutional courts may be deprived in all cases of the determination of facts upon evidence even though a constitutional right may be involved. Reference is also made to the power of the Congress to change the procedure in courts of admiralty, a power to which we have alluded in dealing with the function of the deputy commissioner in passing upon the compensation claims of employees. But when fundamental rights are in question, this Court has repeatedly emphasized "the difference in security of judicial over administrative action." *Ng Fung Ho* v. *White, supra.* Even where issues of fact are tried by juries in the Federal courts, such trials are under the constant superintendence of the trial judge. In a trial by jury in a Federal court the judge is "not a mere moderator" but "is the governor of the trial" for the purpose of assuring its proper conduct as well as of determining questions of law. *Herron* v. *Southern Pacific Co.*, 283 U. S. 91, 95. In the Federal courts, trial by jury "is a trial by a jury of twelve men, in the presence and under the superintendence of a judge empowered to instruct them on the law and to advise them on the facts, and (except on acquittal of a criminal charge) to set aside their verdict if in his opinion it is against the law or the evidence." *Capital Traction Co.* v. *Hof*, 174 U. S. 1, 13, 14. Where testimony in an equity cause is not taken before the court, the proceeding is still constantly subject to the court's control. And while the practice of obtaining the assistance of masters in chancery and commissioners in admiralty may be regarded, as we have pointed out, as furnishing a certain analogy in relation to the normal authority of the deputy commissioner in making what is virtually an assessment of damages, the proceedings of such masters and commissioners are always subject to the direction of the court and their reports are essentially advisory, a distinction of controlling importance when questions of a fundamental character are in issue.

When the validity of an act of the Congress is drawn in question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question

may be avoided.[30] We are of the opinion that such a construction is permissible and should be adopted in the instant case. The Congress has not expressly provided that the determinations by the deputy commissioner of the fundamental or jurisdictional facts as to the locality of the injury and the existence of the relation of master and servant shall be final. The finality of such determinations of the deputy commissioner is predicated primarily upon the provision (Sec. 19 (a)) that he "shall have full power and authority to hear and determine all questions in respect of such claim." But "such claim" is the claim for compensation under the Act and by its explicit provisions is that of an "employee", as defined in the Act, against his "employer." The fact of employment is an essential condition precedent to the right to make the claim. The other provision upon which the argument rests is that which authorizes the Federal court to set aside a compensation order if it is "not in accordance with law." Sec. 21 (b). In the absence of any provision as to the finality of the determination by the deputy commissioner of the jurisdictional fact of employment, the statute is open to the construction that the court in determining whether a compensation order is in accordance with law may determine the fact of employment which underlies the operation of the statute. And, to remove the question as to validity, we think that the statute should be so construed. Further, the Act expressly requires that if any of its provisions is found to be unconstitutional, "or the applicability thereof to any person or circumstances" is held invalid, the validity of the remainder of the Act and "the applicability of its provisions to other persons and circumstances" shall not be affected. Sec. 50. We think that this requirement clearly evidences the intention of the Congress not only that an express provision found to be unconstitutional should be disregarded without disturbing the remainder of the statute, but also that any implication from the terms of the Act which would render them invalid should not be indulged. This provision also gives assurance that there is no violation of the purpose of the Congress in sustaining the determinations of fact of the deputy

[30] Panama R. R. Co. *v.* Johnson, *supra*, at p. 390; Missouri Pacific R. R. Co. *v.* Boone, 270 U. S. 466, 471, 472; Richmond Screw Anchor Co. *v.* United States, 275 U. S. 331, 346; Blodgett *v.* Holden, 275 U. S. 142, 148; Lucas *v.* Alexander, 279 U. S. 573, 577.

commissioner where he acts within his authority in passing upon compensation claims while denying finality to his conclusions as to the jurisdictional facts upon which the valid application of the statute depends.

Assuming that the Federal court may determine for itself the existence of these fundamental or jurisdictional facts, we come to the question,—Upon what record is the determination to be made? There is no provision of the statute which seeks to confine the court in such a case to the record before the deputy commissioner or to the evidence which he has taken. The remedy which the statute makes available is not by an appeal or by a writ of certiorari for a review of his determination upon the record before him. The remedy is "through injunction proceedings, mandatory or otherwise." Sec. 21 (b). The question in the instant case is not whether the deputy commissioner has acted improperly or abritrarily as shown by the record of his proceedings in the course of administration in cases contemplated by the statute, but whether he has acted in a case to which the statute is inapplicable. By providing for injunction proceedings, the Congress evidently contemplated a suit as in equity, and in such a suit the complainant would have full opportunity to plead and prove either that the injury did not occur upon the navigable waters of the United States or that the relation of master and servant did not exist, and hence that the case lay outside the purview of the statute. As the question is one of the constitutional authority of the deputy commissioner as an administrative agency, the court is under no obligation to give weight to his proceedings pending the determination of that question. If the court finds that the facts existed which gave the deputy commissioner jurisdiction to pass upon the claim for compensation, the injunction will be denied in so far as these fundamental questions are concerned; if, on the contrary, the court is satisfied that the deputy commissioner had no jurisdiction of the proceedings before him, that determination will deprive them of their effectiveness for any purpose. We think that the essential independence of the exercise of the judicial power of the United States in the enforcement of constitutional rights requires that the Federal court should determine such an issue upon its own record and the facts elicited before it.

The argument is made that there are other facts besides the locality of the injury and the fact of employment which condition

the action of the deputy commissioner. That contention in any aspect could not avail to change the result in the instant case. But we think that there is a clear distinction between cases where the locality of the injury takes the case out of the admiralty and maritime jurisdiction, or where the fact of employment being absent there is lacking under this statute any basis for the imposition of liability without fault, and those cases which fall within the admiralty and maritime jurisdiction and where the relation of master and servant in maritime employment exists. It is in the latter field that the provisions for compensation apply and that, for the reasons stated in the earlier part of this opinion, the determination of the facts relating to the circumstances of the injuries received, as well as their nature and consequences, may appropriately be subjected to the scheme of administration for which the Act provides.

It cannot be regarded as an impairment of the intended efficiency of an administrative agency that it is confined to its proper sphere, but it may be observed that the instances which permit of a challenge to the application of the statute, upon the grounds we have stated, appear to be few. Out of the many thousands of cases which have been brought before the deputy commissioners throughout the country, a review by the courts has been sought in only a small number,[31] and an inconsiderable proportion of these appear to have involved the question whether the injury occurred within the maritime jurisdiction or whether the relation of employment existed.

We are of the opinion that the District Court did not err in permitting a trial *de novo* on the issue of employment. Upon that issue the witnesses who had testified before the deputy commissioner and other witnesses were heard by the District Court. The writ of certiorari was not granted to review the particular facts but to pass upon the question of principle. With respect to the facts, the two courts below are in accord, and we find no reason to disturb their decision.

Decree affirmed.

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[31] *Supra*, note 10.

SUPREME COURT OF THE UNITED STATES.

Nos. 19 and 20.—October Term, 1931.

Letus N. Crowell, etc., Petitioner, 19 *vs.* Charles Benson. Letus N. Crowell, etc., Petitioner, 20 *vs.* Charles Benson.	On Certiorari to the United States Circuit Court of Appeals for the Fifth Circuit.

[February 23, 1932.]

Mr. Justice Brandeis.

Knudsen filed a claim against Benson under § 19 (a) of the Longshoremen's and Harbor Workers' Compensation Act, March 4, 1927, c. 509, 44 Stat. 1424. Benson's answer denied, among other things, that the relation of employer and employee existed between him and the claimant. The evidence introduced before the deputy commissioner, which occupies 78 pages of the printed record, was directed largely to that issue and was conflicting. The deputy commissioner found that the claimant was in Benson's employ at the time of the injury, and filed an order for compensation under § 21 (a). Benson brought this proceeding under § 21 (b) to set aside the order. The district judge transferred the suit to the admiralty side of the court and held a trial *de novo*, refusing to consider upon any aspect of the case the record before the deputy commissioner. On the evidence introduced in court, he found that the relation of employer and employee did not exist, and entered a decree setting aside the compensation order. 33 F. (2d) 137, 38 F. (2d) 306. The Circuit Court of Appeals affirmed the decree. 45 F. (2d) 66. This Court granted certiorari. 283 U. S. 814. In my opinion, the decree should be reversed, because Congress did not authorize a trial *de novo*.

The primary question for consideration is not whether Congress provided, or validly could provide, that determinations of fact by the deputy commissioner should be conclusive upon the district

court. The question is: Upon what record shall the district court's review of the order of the deputy commissioner be based? The courts below held that the respondent was entitled to a trial *de novo*; that all the evidence introduced before the deputy commissioner should go for naught; and that respondent should have the privilege of presenting new, and even entirely different, evidence in the district court. Unless that holding was correct the judgment below obviously cannot be affirmed.

First. The initial question is one of construction of the Longshoremen's Act. The Act does not in terms declare whether there may be a trial *de novo* either as to the issue whether the relation of employer and employee existed at the time of the injury, or as to any other issue, tried or triable, before the deputy commissioner. It provides, by § 19 (a), "that the deputy commissioner shall have full power and authority to hear and determine all questions in respect of" a claim; by § 21 (a) that the compensation order made by the deputy commissioner "shall become effective" when filed in his office, and "unless proceedings for the suspension or setting aside of such order are instituted as provided in subdivision (b) of this section, shall become final . . ."; and by § 21 (b) that "If not in accordance with law, a compensation order may be suspended or set aside, in whole or in part, through injunction proceedings . . . instituted in the Federal district court. . . ."

The phrase in § 21 (b) providing that the order may be set aside "if not in accordance with law" was adopted from the statutory provision, enacted by the same Congress, for review by the Circuit Courts of Appeals of decisions of the Board of Tax Appeals.[1] This Court has settled that the phrase as used in the tax statute means a review upon the record made before the Board. *Phillips* v. *Commissioner*, 283 U. S. 589, 600. The Compensation Commission has consistently construed the Longshoremen's Act as providing for finality of the deputy commissioners'

[1] Revenue Act of 1926, 44 Stat. 110: "Sec. 1003. (a) The Circuit Courts of Appeals and the Court of Appeals of the District of Columbia shall have exclusive jurisdiction to review the decisions of the Board. . . .

"(b) Upon such review, such courts shall have power to affirm or, if the decision of the Board is not in accordance with law, to modify or to reverse the decision of the Board, with or without remanding the case for a rehearing, as justice may require."

findings on all questions of fact;[2] and care has been taken to provide for formal hearings appropriate to that intention. Compare *Brown* v. *United States*, 113 U. S. 568, 571; *Mason* v. *Routzahn*, 275 U. S. 175, 178. The lower federal courts, except in the case at bar, have uniformly construed the Act as denying a trial *de novo* of any issue determined by the deputy commissioner; have held that, in respect to those issues, the review afforded must be upon the record made before the deputy commissioner; and that the deputy commissioner's findings of fact must be accepted as conclusive if supported by evidence, unless there was some irregularity in the proceeding before him.[3] Nearly

[2]This opinion was expressed in regulations promulgated by the Commission, under authority conferred by § 39 (a), in the form of instructions to deputy commissioners, dated September 28, 1927; and it was repeated in the Commission's report at the close of the first year of its administration of the Act. Report of United States Employees' Compensation Commission, for fiscal year ending June 30, 1928, p. 33. See also *id.*, June 30, 1929, p. 77; *id.*, June 30, 1930, pp. 63-64; *id.*, June 30, 1931, p. 71. The instructions to deputy commissioners, elaborated December 10, 1927, and May 15, 1928, required that the record of proceedings and findings of fact be prepared, and the proceedings be conducted, in consonance with this view of the law.

[3]The question of judicial review under the Act has been passed upon by the First, Second, Third, Fourth and Ninth Circuit Courts of Appeals, as well as the Fifth; by a district court in the Sixth Circuit; and by the Court of Appeals of the District of Columbia, under the Act of May 17, 1928, c. 612, 45 Stat. 600. Pocahontas Fuel Co. *v.* Monahan, 41 F. (2d) 48, 49 (C. C. A. 1st), aff'g 34 F. (2d) 549, 551, [1929] A. M. C. 1598 (D. Me.); Joyce *v.* United States Deputy Commissioner, 33 F. (2d) 218, 219 (D. Me.); Jarka Corporation *v.* Monahan, 48 F. (2d) 283, 284 (D. Mass.); Booth *v.* Monahan (D. Me.), decided October 16, 1930 (unreported); Wilson & Co., Inc. *v.* Locke, 50 F. (2d) 81, 82 (C. C. A. 2d); Travelers Insurance Co. *v.* Locke, (S. D. N. Y.), decided June 30, 1931 (unreported); Calabrese *v.* Locke (S. D. N. Y.), decided July 23, 1931 (unreported); W. J. McCahan Sugar Refining & Molasses Co. *v.* Norton, 43 F. (2d) 505, 506 (C. C. A. 3d), aff'g 34 F. (2d) 499, [1929] A. M. C. 1269 (E. D. Pa.); Independent Pier Co. *v.* Norton (C. C. A. 3d), decided December 26, 1931 (unreported); Baltimore & Carolina S. S. Co. *v.* Norton, 40 F. (2d) 271, 272 (E. D. Pa.); Merchants' & Miners' Transp. Co. *v.* Norton, 32 F. (2d) 513, 515 (E. D. Pa.); Jarka Corporation *v.* Norton (E. D. Pa.), decided January 23, 1930 (unreported); Frank Marra Co. *v.* Norton (E. D. Pa.), decided August 7, 1931 (unreported); Wheeling Corrugating Co. *v.* McManigal, 41 F. (2d) 593, 594, 595 (C. C. A. 4th); Obrecht-Lynch Corporation *v.* Clark, 30 F. (2d) 144, 146 (D. Md.); Keyway Stevedoring Co. *v.* Clark, 43 F. (2d) 983 (D. Md.); Kranski *v.* Atlantic Coast Shipping Co. (D. Md.), decided January 7, 1930 (unreported);

all the state courts have construed the state workmen's compensation laws, as limiting the judicial review to matters of law.[4]

Chesapeake Ship Ceiling Co. *v.* Clark (D. Md.), decided May 22, 1930 (unreported); Goble *v.* Clark (D. Md.), decided May, 1931 (unreported); Michigan Transit Corporation *v.* Brown (W. D. Mich.), decided November 16, 1929 (unreported); Northwestern Stevedoring Co. *v.* Marshall, 41 F. (2d) 28, 29 (C. C. A. 9th); Gunther *v.* United States Employees' Compensation Commission, 41 F. (2d) 151, 153 (C. C. A. 9th); Grays Harbor Stevedore Co. *v.* Marshall, 36 F. (2d) 814, 815 (W. D. Wash.); Zurich General Accident & Liability Ins. Co. *v.* Marshall, 42 F. (2d) 1010, 1011 (W. D. Wash.); Todd Dry Docks, Inc. *v.* Marshall, 49 F. (2d) 621, 623 (W. D. Wash.); Grays Harbor Stevedore Co. *v.* Marshall (W. D. Wash.), decided October 16, 1929 (unreported); Rothschild & Co. *v.* Marshall (W. D. Wash.), decided June 30, 1930 (unreported), reversed on other grounds, 44 F. (2d) 546 (C. C. A. 9th); Lea Mathew Shipping Corporation *v.* Marshall (W. D. Wash.), decided September 5, 1930 (unreported); Griffiths & Sprague Stevedoring Co. *v.* Marshall (W. D. Wash.), decided October 13, 1930 (unreported); W. R. Grace & Co. *v.* Marshall (W. D. Wash.), decided February 11, 1931 (unreported); Nelson *v.* Marshall (W. D. Wash.), decided April 20, 1931 (unreported); Grant *v.* Marshall (W. D. Wash.), decided April 20, 1931 (unreported); Zurich General Accident & Liability Co. *v.* Marshall (W. D. Wash.), decided April 24, 1931 (unreported); Ocean Accident & Guarantee Corporation *v.* Solberg (W. D. Wash.), decided July 29, 1931 (unreported); compare Lake Washington Shipyards *v.* Brueggeman (W. D. Wash.), decided May 4, 1931 (unreported); New Amsterdam Casualty Co. *v.* Hoage, 46 F. (2d) 837 (Ct. of App. D. C.); Hoage *v.* Murch Bros. Const. Co., 50 F. (2d) 983, 984 (Ct. of App. D. C.). See also the following decisions by district courts in the Fifth Circuit; Showers *v.* Crowell, 46 F. (2d) 361 (W. D. La.); Howard *v.* Monahan, 31 F. (2d) 480, 481, 33 F. (2d) 220, 221 (S. D. Tex.). Compare T. J. Moss Tie Co. *v.* Tanner, 44 F. (2d) 928 (C. C. A. 5th); Houston Ship Channel Stevedoring Co. *v.* Sheppeard, [1931] A. M. C. 1605 (S. D. Tex.)

[4]The Court has been referred to no case arising under the state workmen's compensation laws recognizing a right to trial *de novo* in court. Numerous decisions declare administrative findings of fact to be conclusive. The following decisions all dealt with controversies concerning the existence of a relation of employment. Hillen *v.* Industrial Accident Commission, 199 Cal. 577, 580; York Junction Transfer & Storage Co. *v.* Industrial Accident Commissioners, 202 Cal. 517, 521; Index Mines Corporation *v.* Industrial Commission, 82 Colo. 272, 275; Ocean Accident & Guarantee Corp. *v.* Wilson, 36 Ga. App. 784; Taylor *v.* Blackwell Lumber Co., 37 Idaho 707, 721; Cinofsky *v.* Industrial Commission, 290 Ill. 521, 525; Franklin Coal Co. *v.* Industrial Commission, 296 Ill. 329, 334; A. E. Norris Coal Co. *v.* Jackson, 80 Ind. App. 423, 425; Murphy *v.* Shipley, 200 Iowa 857, 859; Churchill's Case, 265 Mass. 117, 119; Hill's Case, 268 Mass. 491, 493; Matter of Dale *v.* Saunders Brothers, 218 N. Y. 59, 63; Federal Mining & Smelting Co. *v.* Thomas, 99 Okla. 24, 26; Oklahoma Pipe Line Co. *v.* Lindsey, 113 Okla. 296, 298; Belmonte *v.* Connor, 263 Pa. 470, 472.

Provisions in other federal statutes, similar to those here in question, creating various administrative tribunals, have likewise been treated as not conferring the right to a judicial trial *de novo*.[5]

The safeguards with which Congress has surrounded the proceedings before the deputy commissioner would be without mean-

[5](a) Interstate Commerce Commission: Act of June 18, 1906, c. 309, § 1, 36 Stat. 539; see Interstate Commerce Commission *v.* Louisville & Nashville R. R. Co., 227 U. S. 88, 92; United States *v.* Louisville & Nashville R. R. Co., 235 U. S. 314, 320, 321; Louisville & Nashville R. R. Co. *v.* United States, 245 U. S. 463, 466, and other cases collected in I. L. Sharfman, "The Interstate Commerce Commission II," pp. 384-393, 417 *et seq.;* Act of June 18, 1910, c. 309, § 13, 36 Stat. 539, 555; Act of March 1, 1913, c. 92, 37 Stat. 701, 703. See Tagg Bros. & Moorhead *v.* United States, 280 U. S. 420, 444n.

(b) Federal Trade Commission: Act of September 26, 1914, c. 311, § 5, 38 Stat. 717, 719-20; see Federal Trade Commission *v.* Curtis Publishing Co., 260 U. S. 568, 579, 580; Federal Trade Commission *v.* Pacific States Paper Trade Ass'n, 273 U. S. 52, 63; Arkansas Wholesale Grocers' Ass'n *v.* Federal Trade Commission, 18 F. (2d) 866, 870, 871; Gregory Hankin, "Conclusiveness of the Federal Trade Commission's Findings as to Facts," 23 Mich. L. Rev. 233, 262-67; Act of October 15, 1914, c. 323, § 11, 38 Stat. 730, 735 (applicable also in appropriate cases to Interstate Commerce Commission and Federal Reserve Board); see Federal Trade Commission *v.* Curtis Publishing Co., *supra;* International Shoe Co. *v.* Federal Trade Commission, 280 U. S. 291, 297.

(c) Federal Power Commission: Act of June 10, 1920, c. 285, § 20, 41 Stat. 1063, 1074.

(d) United States Shipping Board: Act of September 7, 1916, c. 451, §§ 29, 31, 39 Stat. 728, 737, 738; see Isthmian Steamship Co. *v.* United States (S. D. N. Y.), decided December 7, 1931 (not yet reported); compare Cunard S. S. Co. *v.* United States Nav. Co., decided February —, 1932.

(e) Secretary of Agriculture: Act of August 15, 1921, c. 64, §§ 315, 316, 42 Stat. 159, 168; see Tagg Bros. & Moorhead *v.* United States, 280 U. S. 420, 443, 444; Stafford *v.* Wallace, 258 U. S. 495, 512; Act of August 15, 1921, c. 64, § 204, 42 Stat. 159, 162; Act of June 10, 1930, c. 436, §§ 10, 11, 46 Stat. 531, 535.

(f) Board of Tax Appeals: Act of February 26, 1926, c. 27, § 1003 (a), 44 Stat. 9, 110; see Phillips *v.* Commissioner, 283 U. S. 589, 600.

(g) Grain Futures Commission: Act of September 21, 1922, c. 369, § 6 (b), 42 Stat. 998, 1002.

(h) District of Columbia Rent Commission: Act of October 22, 1919, c. 80, Title II, § 108, 41 Stat. 297, 301; see Block *v.* Hirsh, 256 U. S. 135, 158; Killgore *v.* Zinkhan, 274 Fed. 140, 142.

In instances in which Congress intended to permit the introduction of additional evidence in the district court it has so provided in express terms. See, *e. g.*, Act of February 18, 1922, c. 57, § 2, 42 Stat. 388, 389. Compare the provision for review of reparation orders of the Interstate Commerce

ing if those proceedings were to serve merely as an inquiry preliminary to a contest in the courts.[6] Specific provisions of the Longshoremen's Act make clear that it was the aim of Congress to expedite the relief afforded. With a view to obviating the delays incident to judicial proceedings the Act substitutes an administrative tribunal for the court; and, besides providing for notice and opportunity to be heard, endows the proceedings before the deputy commissioner with the customary incidents of a judicial hearing. It prescribes that the parties in interest may be represented by counsel, § 19 (d); that the attendance of witnesses and the production of documents may be compelled, § 27 (a); that the hearings shall be public, and that they shall be stenographically reported, § 23 (b); that there shall be made "a record of the hearings and other proceedings before the deputy commissioners", § 23 (b); "that the deputy commissioner shall have full power and authority to hear and determine all questions in respect of" a claim, § 19 (a); and that his order shall become final after 30 days, unless a proceeding is filed under § 21 (b) charging that it is "not in accordance with law." Procedure of this character, instead of expediting relief, would entail useless expense and delay if the proceedings before the deputy commissioner were to be repeated in court, and the case tried from the beginning, at the option of either party. The conclusion that Congress did not so intend is confirmed by reference to the legislative history of the Act.[7] Compare *Caminetti* v. *United States*, 242 U. S. 470, 490.

Commission, Act of June 18, 1910, c. 309, 313, 36 Stat. 539, 554, and of orders for the payment of money by the Shipping Board. Act of September 7, 1916, c. 451, § 30, 39 Stat. 728, 737.

[6]Compare Freund, "Administrative Powers Over Persons and Property", p. 279.

[7]Two bills providing workmen's compensation for longshoremen and harbor workers were before the Congress at the same time. H. R. 9498, which was first reported favorably to the House, declared in terms, §§ 22, 24, that "the decision of the deputy commissioner shall be final as to all questions of fact and except as provided in section 24 as to all questions of law." This bill was abandoned by the House in favor of S. 3170, in order that some legislation on the subject, under what was regarded as an emergency, might be passed at that session. H. D., 69th Cong., 1st Sess., ser. 16, pt. 2, pp. 139-141. Although the differences between the two bills were minutely examined in the hearings before the House Committee on the Judiciary, no reference was made to any change in the provisions for review of compensa-

Second. Nothing in the statute warrants the construction that the right to a trial *de novo* which Congress has concededly denied as to most issues of fact determined by the deputy commissioner has been granted in respect to the issue of the existence of the employer-employee relation. The language which is held sufficient to foreclose the right to such a trial on some issues forecloses it as to all. Whether the peculiar relation which the fact of employment is asserted to bear to the scheme of the statute and to the constitutional authority under which it was passed, might conceivably have induced Congress to provide a special method of review upon that question, it is not necessary to inquire. For Congress expressly declared its intention to put, for purposes of review, all the issues of fact on the same basis, by conferring upon the deputy commissioner "full power to hear and determine all questions in respect of such claim", subject only to the power of the court to set aside his order "if not in accordance with law".

The suggestion that "such claim" may be construed to mean only a claim within the purview of the Act seems to me without substance. Logically applied, the suggestion would leave the deputy commissioner powerless to hear or determine any issue of asserted non-liability under the Act. For non-existence of the employer-employee relation is only one of many grounds of non-liability. Thus, there is no liability if the injury was occasioned solely by the intoxication of the employee; or if the injury was due to the wilful intention of the employee to injure or kill himself or another; or if it did not arise "out of or in the course of employment"; or if the employer was not engaged in maritime employment in whole or in part; or if the injured person was the employee of a subcontractor who has secured payment of compensation; or if the pro-

tion orders; but on the contrary it was affirmatively stated that the Senate bill likewise enacted administrative finality upon questions of fact. *Id.*, pt. 2, p. 200. The same statement was made in the Senate hearings. *Id.*, pt. 1, pp. 53, 66. The bill was reported to the House as having been amended to "conform substantially" to the bill theretofore reported. H. Rep., No. 1767, 69th Cong., 1st Sess. Both in this report and in the brief debates in both houses, the bill was described as designed to prevent the delay and injustice incident to litigation, and as affording to maritime workers the same remedies as those provided in state workmen's compensation laws. See 67 Cong. Rec. 10614; 68 Cong. Rec. 5410-5414, 5908. The state workmen's compensation statutes have, almost universally, been construed to provide for final administrative determination of questions of fact, including the fact of the existence of an employment. See note 4, *supra*.

ceeding is brought against the wrong person as employer; or if the disability or death is that of a master or a member of the crew of any vessel; or if it is that of a person engaged by the master to load or unload or repair any small vessel under eighteen tons net; or if it is that of an officer or employee of the United States or any agency thereof; or if it is that of an officer or employee of any State, or foreign government, or any political subdivision thereof; or if recovery for the disability or death through workmen's compensation proceedings may be validly provided by state law. And obviously there is no liability if there was in fact neither disability nor death. It is not reasonable to suppose that Congress intended to set up a fact-finding tribunal of first instance, shorn of power to find a portion of the facts required for any decision of the case; or that in enacting legislation designed to withdraw from litigation the great bulk of maritime accidents, it contemplated a procedure whereby the same facts must be twice litigated before a longshoreman could be assured the benefits of compensation.

The circumstance that Congress provided, in § 21 (b), for review of orders of the deputy commissioner by injunction proceedings is urged as indicative of an intention that in such proceedings the complainant should have full opportunity to plead and prove any facts showing that the case lay outside the purview of the statute. But by this reasoning, again, many other questions besides those referred to by the Court would be open to retrial upon new, and different, evidence. The simple answer is that on bills in equity to set aside orders of a federal administrative board there is no trial *de novo* of issues of fact determined by that tribunal. As stated in *Tagg Bros. & Moorhead* v. *United States,* 280 U. S. 420, 443, concerning orders of the Secretary of Argiculture under the Packers and Stockyards Act:

"A proceeding under § 316 of the Packers and Stockyards Act is a judicial review, not a trial *de novo.* The validity of an order of the Secretary, like that of an order of the Interstate Commerce Commission, must be determined upon the record of the proceedings before him—save as there may be an exception of issues presenting claims of constitutional right, a matter which need not be considered or decided now."[8]

[8]Congress has incorporated by reference the provisions for review of orders of the Interstate Commerce Commission in authorizing judicial review of certain orders of the Federal Power Commission and the Shipping Board, as it did in the Packers and Stockyards Act. See note 5, *supra.*

In the review of the *quasi*-judicial decisions of these federal administrative tribunals the bill in equity serves the purpose which at common law, and under the practice of many of the States, is performed by writs of certiorari.[9] It presents to the reviewing court the record of the proceedings before the administrative tribunal in order that determination may be made, among other things, whether the authority conferred has been properly exercised.[10] Neither upon bill in equity in the federal courts nor writ of certiorari in the States is it the practice to permit fresh evidence to be offered in the reviewing court. There is no foundation for the suggestion that Congress intended to provide otherwise in the Longshoremen's Act.

Third. It is said that the provision for a trial *de novo* of the existence of the employer-employee relation should be read into the Act in order to avoid a serious constitutional doubt. It is true that where a statute is equally susceptible of two constructions, under one of which it is clearly valid and under the other of which it may be unconstitutional, the court will adopt the former construction. *Presser* v. *Illinois*, 116 U. S. 252, 269; *Knights Templars' Indemnity Co.* v. *Jarman*, 187 U. S. 197, 205; *Carey* v. *South Dakota*, 250 U. S. 118, 122; *Missouri Pacific R. R.*

[9] In People *ex rel.* New York & Queens Gas Co. *v.* McCall, 219 N. Y. 84, 88, 90, it was held that the scope of the review on certiorari of an order of the Public Service Commission was the same as that of the federal court on bill in equity of the orders of the Interstate Commerce Commission as declared in Interstate Commerce Commission *v.* Illinois Central R. R. Co., 215 U. S. 452, 470. Compare Vanfleet, "Collateral Attack on Judicial Proceedings, §§ 2, 3.

[10] Certiorari is the historic writ for determining whether the action of an inferior tribunal has been taken within its jurisdiction; and it has sometimes been held that the writ lies only to determine this question. Compare Jackson *v.* People, 9 Mich. 111. But, although there is considerable divergence in the practice of the various States as to the scope of the review, the proceeding, apart from extraordinary statutory provisions, is universally upon the record and the evidence before the inferior tribunal, and not a trial *de novo*. Fore *v.* Fore, 44 Ala. 478, 484; City of Los Angeles *v.* Young, 118 Cal. 295, 298; Great Western Power Co. *v.* Pillsbury, 170 Cal. 180, 185, 186; Uphoff *v.* Industrial Board, 271 Ill. 312; Tiedt *v.* Carstensen, 61 Iowa 334, 336; Lord *v.* County Commissioners, 105 Maine 556, 561; Jackson *v.* People, 9 Mich. 111, 119, 120; Wait *v.* Krewson, 59 N. J. L. 71, 75; Milwaukee Western Fuel Co. *v.* Industrial Commission, 159 Wis. 635, 641, 642. It was so at common law. See Freund, "Administrative Powers Over Persons and Property," pp. 267-269.

Co. v. *Boone,* 270 U. S. 466, 471, 472. But this Act is not equally susceptible to two constructions. The court may not, in order to avoid holding a statute unconstitutional, engraft upon it an exception or other provision. *Butts* v. *Merchants & Miners Transportation Co.,* 230 U. S. 126, 133; *The Employers' Liability Cases,* 207 U. S. 463, 500-502; *Trade-Mark Cases,* 100 U. S. 82, 99; *United States* v. *Fox,* 95 U. S. 670, 672, 673; *United States* v. *Reese,* 92 U. S. 214, 221. Compare *Illinois Central R. R. Co.* v. *McKendree,* 203 U. S. 514, 529; *Cella Commission Co* v. *Bohlinger,* 147 Fed. 419, 423, 424. Neither may it do so to avoid having to resolve a constitutional doubt. To hold that Congress conferred the right to a trial *de novo* on the issue of the employer-employee relation seems to me a remaking of the statute and not a construction of it.

Fourth. Trial *de novo* of the issue of the existence of the employer-employee relation is not required by the due process clause. That clause ordinarily does not even require that parties shall be permitted to have a judicial tribunal pass upon the weight of the evidence introduced before the administrative body. See *Dahlstrom Metallic Door Co.* v. *Industrial Board,* 284 U. S. —. The findings of fact of the deputy commissioner, the Court now decides, are conclusive as to most issues, if supported by evidence. Yet as to the issue of employment the Court holds not only that such findings may not be declared final, but that it would create a serious constitutional doubt to construe the Act as committing to the deputy commissioner the simple function of collecting the evidence upon which the court will ultimately decide the issue.

It is suggested that this exception is required as to issues of fact involving claims of constitutional right. For reasons which I shall later discuss, I cannot believe that the issue of employment is one of constitutional right. But even assuming it to be so, the conclusion does not follow that trial of the issue must therefore be upon a record made in the district court. That the function of collecting evidence may be committed to an administrative tribunal is settled by a host of cases,[11] and supported by persuasive

[11] See the statutes and cases cited in note 5, *supra.* Similar decisions have been repeatedly made, under the Fourteenth Amendment, in cases coming from the state courts. This Court has recently decided that a state workmen's compensation act may validly provide for judicial review upon matters of law only. Dahlstrom Metallic Door Co. *v.* Industrial Board, 284 U. S. —.

analogies, none of which justify a distinction between issues of constitutional right and any others. Resort to administrative remedies may be made a condition precedent to a judicial hearing. *Northern Pacific Ry. Co.* v. *Solum*, 247 U. S. 477, 483, 484; *First National Bank of Greeley* v. *Board of County Commissioners*, 264 U. S. 450, 454, 455; *United States Navigation Co.* v. *Cunard S. S. Co.*, decided February 15, 1932. This is so even though a party is asserting deprivation of rights secured by the Federal Constitution. *First National Bank of Greeley* v. *Board of County Commissioners, supra.* In federal equity suits, the taking of evidence on any issue in open court did not become common until 1913,[12] compare *Los Angeles Brush Manufacturing Corporation* v. *James*, 272 U. S. 701; and in admiralty it was not required by the Rules of this Court until 1921.[13] Compare *The P. R. R. No. 35*, 48 F. (2d) 122. On ap-

See also New York Central R. R. Co. *v.* White, 243 U. S. 188, 207, 208. In Missouri *ex rel.* Hurwitz *v.* North, 271 U. S. 40, 42, it was held that a state board of health might be empowered, upon reasonable notice, specification of charges and opportunity to be heard, to revoke a physician's license, subject only to review in the courts upon certiorari. In Washington *ex rel.* Oregon Railroad & Navigation Co. *v.* Fairchild, 224 U. S. 510, 527, a statute was upheld which confined the court upon review of a public service commission's order to the evidence introduced before the commission. See also Wadley Southern Ry. Co. *v.* Georgia, 235 U. S. 651, 661; New York *ex* rel. New York & Queens Gas Co. *v.* McCall, 245 U. S. 345, 348, 349; Napa Valley Electric Co. *v.* Railroad Commission, 251 U. S. 366, 370; Northern Pacific Ry. Co. *v.* Department of Public Works, 268 U. S. 39, 42. In Long Island Water Supply Co. *v.* Brooklyn, 166 U. S. 685, 695, it was held that the findings of fact by commissioners in assessing damages in condemnation proceedings might be made final, leaving open to the court only the question whether there was any error in the basis of appraisal, or otherwise. See also Crane *v.* Hahlo, 258 U. S. 142, 147; Hardware Dealers Mutual Fire Insurance Co. *v.* Glidden Co., 284 U. S. 151. Compare Pacific Live Stock Co. *v.* Lewis, 241 U. S. 440, 451, 452.

[12]See Griswold and Mitchell, "The Narrative Record in Federal Equity Appeals," 42 Harv. L. Rev. 483, 488, 491; Lane, "One Year Under the New Federal Equity Rules", 27 Harv. L. Rev. 629, 639. Compare 2 Daniell, "Chancery Practice", (2d ed.), 1045-46, 1053-54, 1069 *et seq.*

[13]Admiralty Rule 46, 254 U. S. 698. Subsequent to 1842, when the procedure in admiralty became subject to rules promulgated by this Court, and prior to 1921, no rule specifically required that evidence be taken orally in open court, and the practice in some districts appears to have been to take proofs by a commission. Compare Admiralty Rules 44, 46, 210 U. S. 558; The Guy C. Goss, 53 Fed. 826, 827; The Wavelet, 25 Fed. 733, 734. See

peals in admiralty, further proof is now taken by a commission.[14] As was said concerning a similar tribunal in *Washington ex rel. Oregon Railroad & Navigation Co.* v. *Fairchild,* 224 U. S. 510, 527, the function of the deputy commissioner is like that of a master in chancery who has been required to take testimony and report his findings of fact and conclusions of law. Compare *Los Angeles Brush Corporation* v. *James, supra; Kimberly* v. *Arms,* 129 U. S. 512, 524, 525; *Armstrong* v. *Belding Bros. & Co.,* 297 Fed. 728, 729. The holding that the difference between the procedure prescribed by the Longshoremen's Act and these historic methods of hearing evidence transcends the limits of congressional power when applied to the issue of the existence of a relation of employment, as distinguished from that of the circumstances of an injury or the existence of a relation of dependency, seems to me without foundation in reality. Certainly, there is no difference to the litigant.

Even in respect to the question, discussed by the Court, of the finality to be accorded administrative findings of fact in a civil case involving pecuniary liability, I see no reason for making special exception as to issues of constitutional right, unless it be that under certain circumstances, there may arise difficulty in reaching conclusions of law without consideration of the evidence as well as the findings of fact. See *Tagg Bros. & Moorhead* v. *United States,* 280 U. S. 420, 443. Compare *Ohio Valley Water Co.* v. *Ben Avon Borough,* 253 U. S. 287. The adequacy of that reason need not be discussed. For as to the issue of employment no such difficulty can be urged. Two decades of experience in the States testify to the appropriateness of the administrative process as applied to this issue, as well as all others, in workmen's compensation controversies.

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also The Sun, 271 Fed. 953, 954. Under the present rules the district court may still, upon proper circumstances, refer causes in admiralty to a commissioner, without the consent of the parties, to hear the testimony and report conclusions on issues of fact and law. The P. R. R. No. 35, 48 F. (2d) 122; Sorenson & Co. *v.* Liverpool, Brazil & River Plate Steam Nav. Co., 47 F. (2d) 332. Compare The "City of Washington", 92 U. S. 31, 39; Los Angeles Brush Manufacturing Corporation *v.* James, 272 U. S. 701. The commissioner's findings of fact are not disturbed unless clearly erroneous. La Bourgogne, 144 Fed. 781, 783, aff'd, 210 U. S. 95; Anderson *v.* Alaska S. S. Co., 22 F. (2d) 532, 535.

[14] See Admiralty Rule 45, 254 U. S. 698; Rule 15, 275 U. S. 607.

Fifth. Trial *de novo* of the existence of the employer-employee relation is not required by the Judiciary Article of the Constitution. The mere fact that the Act deals only with injuries arising on navigable waters, and that independently of legislation such injuries can be redressed only in courts of admiralty,[15] obviously does not preclude Congress from denying a trial *de novo*. For the Court holds that it is compatible with the grant of power under Article III to deny a trial *de novo* as to most of the facts upon which rest the allowance of a claim and the amount of compensation. Its holding that the Constitution requires a trial *de novo* of the issue of the employer-employee relation is based on the relation which that fact bears to the statutory scheme propounded by Congress, and to the constitutional authority under which the Act was passed. The argument is that existence of the relation of employer and employee is, as a matter of substantive law, indispensable to the application of the statute, because the power of Congress to enact the legislation turns upon its existence; and that whenever the question of constitutional power depends upon an issue of fact that issue must, as a matter of procedure, be determinable independently upon evidence freshly introduced in a court.[16] Neither proposition seems to me well founded.

Whether the power of Congress to provide compensation for injuries occurring on navigable waters is limited to cases in which the employer-employee relation exists has not heretofore been passed upon by this Court and was not argued in this case. I see

[15]The decision of the District Court, acquiesced in by the Circuit Court of Appeals and this Court, that the remedy under § 21 (b) of the Longshoreman's Act is in admiralty seems to me unfounded. The provision in that section for suspending or setting aside a compensation order by injunction clearly implies a proceeding upon bill in equity. Congress may authorize actions for maritime torts to be brought on the law side of the federal district courts, Panama R. R. Co. *v.* Johnson, 264 U. S. 375, 385; or in the state courts, Engel *v.* Davenport, 271 U. S. 33, 37. See also Chelentis *v.* Luckenbach S. S. Co., 247 U. S. 372, 384. No constitutional objection can exist, therefore, to giving effect to the remedy in equity provided in this Act.

[16]The opinion of the Court suggests that, upon similar reasoning, the issue whether the injury occurred on navigable waters must likewise be open to independent redetermination, upon the facts as well as the law, in the district court. The question whether any peculiar significance attaches to such a controversy, entitling it to be twice tried, is not before us. It has never been decided that the power of Congress to provide compensation for injuries

no justification for assuming, under those circumstances, that it is so limited. Without doubt the word "employee" was used in the Longshoremen's Act in the sense in which the common law defines it. But that definition is not immutable; and no provision of the Constitution confines the application of liability without fault to instances where the relation of employment, as so defined, exists.[17] Compare *Louis Pizitz Dry Goods Co.* v. *Yeldell*, 274 U. S. 112, 116. Whether an individual is an employee or an independent contractor, depends upon criteria often subtle and uncertain of application,[18] criteria which have been developed, by processes of ju-

to workmen received in the course of maritime employment depends upon the injury having occurred upon navigable waters. See Benedict, "The American Admiralty", 4 (5th ed.), § 25. Compare Soper *v.* Hammond Lumber Co., 4 F. (2d) 872; State Industrial Commission *v.* Nordenholt Corporation, 259 U. S. 263. The Longshoremen's Act undertakes to cover only the field of admiralty jurisdiction within which the decisions of this Court have held uniformity to be required. See Stanley Morrison, "Workmen's Compensation and the Maritime Law", 38 Yale L. J. 472, 500.

[17]That legislatures may abolish defenses recognized at common law and create new causes of action not so recognized is beyond question. So also is the power, under proper circumstances, to provide for liability without fault. Compare St. Louis & San Francisco Ry. Co. *v.* Mathews, 165 U. S. 1; Chicago, Rock Island & Pacific Ry. Co. *v.* Zernecke, 183 U. S. 582; St. Louis, Iron Mountain & Southern Ry. Co. *v.* Taylor, 210 U. S. 281; New York Central R. R. Co. *v.* White, 243 U. S. 188. Congress may provide that a carrier shall be liable for loss or damage to goods occurring beyond its own lines. Atlantic Coast Line R. R. Co. *v.* Riverside Mills, 219 U. S. 186, 203. See also Atlantic Coast Line R. R. Co. *v.* Glenn, 239 U. S. 388, 393. "The rule," said the Court, "is adapted to secure the rights of the shipper by securing unity of transportation with unity of responsibility." That Congress might not similarly secure unity of responsibility for injuries to all persons working upon the same enterprise, irrespective of the particular relation existing of contract or employment, is not to be assumed without argument and in the absence of circumstances presenting the question. The logic upon which workmen's compensation acts have been sustained does not require insistence upon a technical master and servant relation. Compare Ward & Gow *v.* Krinsky, 259 U. S. 503. See also Jeremiah Smith, "Sequel to Workmen's Compensation Acts," 27 Harv. L. Rev. 235, 344.

The common law, of course, holds many examples of liability to third persons for injury sustained at the hands of an independent contractor or his servant. *E. g.*, Ellis *v.* Sheffield Co., 2 E. & B. 767; Pickard *v.* Smith, 10 C. B. (n. s.) 470; Doll *v.* Ribetti, 203 Fed. 593.

[18]See the analysis and criticism in William O. Douglas, "Vicarious Liability and Administration of Risk," 38 Yale L. J. 584, 594-604. Compare O. W. Holmes, "Agency", 5 Harv. L. Rev. 1, 14-16.

dicial exclusion and inclusion, largely since the adoption of the Constitution[19] and with reference, for the most part, to considerations foreign to industrial accident litigation. It is not to be assumed that Congress, having power to amend and revise the maritime law, is prevented from modifying those criteria and enlarging the liability imposed by this Act so as to embrace all persons who are engaged or engage themselves in the work of another, including those now designated as independent contractors. In the Longshoremen's Act itself, Congress, far from declaring the relation of master and servant indispensable in all cases to the application of the statute, provided expressly that a contractor shall be liable to employees of a subcontractor who has failed to secure payment of compensation. § 4 (a). State workmen's compensation laws almost invariably contain provisions for liability either to independent contractors or to their employees, sometimes absolute and sometimes conditioned upon default by the immediate employer;[20] and

[19]See Baty, "Vicarious Liability", *passim;* Francis Bowes Sayre, "Criminal Responsibility for Acts of Another", 43 Harv. L. Rev. 689, 691-694; O. W. Holmes, "Agency", 4 Harv. L. Rev. 345, 5 id. 1. The first text-book on Agency did not appear until 1812. Paley, "The Law of Principal and Agent."

[20]See the digests of the statutes in L. V. Hill and Ralph H. Wilkin, "Workmen's Compensation Statute Law"; and F. Robertson Jones, "Digest of Workmen's Compensation Laws" (10th ed.). The provision in the New York Workmen's Compensation Act, § 56, is illustrative: "A contractor, the subject of whose contract is, involves or includes a hazardous employment, who subcontracts all or any part of such contract shall be liable for and shall pay compensation to any employee injured. . . ." In 1927, in recommending the extension of this provision to include owners or lessees as well as general contractors, the State Industrial Commissioner said: "From the point of view of making sure of compensation to injured workers, all the reasons for the existing obligations put upon a general contractor for a piece of building work who sublets part of the work, are equally cogent for doing the same in case of an owner or lessee of premises who lets part of building work in precisely the same way. The practical need for doing it has been shown by experience to be extensive owing to the large amount of building work now being done under the method above noted and which this amendment is designed to cover.

"The existing provision has proven very beneficial in the case of contractors, and it will be equally useful in the case of the type of owner-contractor, so to speak, who must now be dealt with for solution of the same problem." Annual Report of the Industrial Commissioner (1927), pp. 4, 5.

these provisions appear to have been uniformly upheld.[21] I cannot doubt that, even upon the view of the evidence taken by the District Court, Congress might have made Benson liable to Knudsen for the injury which he sustained.

Sixth. Even if the constitutional power of Congress to provide compensation is limited to cases in which the employer-employee relation exists, I see no basis for a contention that the denial of the right to a trial *de novo* upon the issue of employment is in any manner subversive of the independence of the federal judicial power. Nothing in the Constitution, or in any prior decision of this Court to which attention has been called, lends support to the doctrine that a judicial finding of any fact involved in any civil proceeding to enforce a pecuniary liability may not be made upon evidence introduced before a properly constituted administrative tribunal, or that a determination so made may not be deemed an independent judicial determination. Congress has repeatedly exercised authority to confer upon the tribunals which it creates, be they administrative bodies or courts of limited jurisdiction, the power to receive evidence concerning the facts upon which the exercise of federal power must be predicated, and to determine whether those facts exist. The power of Congress to provide by legislation for liability under certain circumstances subsumes the power to provide for the determination of the existence

[21] See, *e. g.*, Industrial Commission *v.* Continental Investment Co., 78 Colo. 398, 401, 402; Palumbo *v.* George A. Fuller Co., 99 Conn. 355, 358; Fisk *v.* Bonner Tie Co., 40 Idaho 304, 308; Parker-Washington Co. *v.* Industrial Board, 274 Ill. 498, 504; American Steel Foundries *v.* Industrial Board, 284 Ill. 99, 103; McDowell *v.* Duer, 78 Ind. App. 440, 444, 445; Burt *v.* Clay, 20y Ky. 278, 281; Seabury *v.* Arkansas Natural Gas Corporation, 171 La. 199, 204, 205; White *v.* George B. H. Macomber Co., 244 Mass. 195, 198; Burt *v.* Munising Woodenware Co., 222 Mich. 699, 702, 703; De Lonjay *v.* Hartford Accident & Indemnity Co., 35 S. W. (2d) 911, 912 (Mo.); Sherlock *v.* Sherlock, 112 Neb. 797, 799; O'Banner *v.* Pendlebury, 107 N. J. L. 245, 247; Clark *v.* Monarch Engineering Co., 248 N. Y. 103, 110; De Witt *v.* State, 108 Ohio St. 513, 522-525; Green *v.* State Industrial Commission, 121 Okla. 211, 212; Qualp *v.* James Stewart Co., 266 Pa. 502; Murray *v.* Wasatch Grading Co., 73 Utah 430, 436, 439; Threshermen's Nat. Ins. Co. *v.* Industrial Commission, 201 Wis. 303, 306; Wisinger *v.* White Oil Corporation, 24 F. (2d) 101, 102. But compare Flickenger *v.* Industrial Accident Commission, 181 Cal. 424, 432, 433. Liability to pay compensation obtains in England under circumstances in which no relation of employment exists. See Mulrooney *v.* Todd (1909), 1 K. B. 165; Marks *v.* Carne (1909), 2 K. B. 516.

of those circumstances. It does not depend upon the absolute existence in reality of any fact.

It is true that, so far as Knudsen is concerned, proof of the existence of the employer-employee relation is essential to recovery under the Act. But under the definition laid down in *Noble* v. *Union River Logging Co.*, 147 U. S. 165, 173, 174, that fact is not jurisdictional. It is *quasi*-jurisdictional. The existence of a relation of employment is a question going to the applicability of the substantive law, not to the jurisdiction of the tribunal. Jurisdiction is the power to adjudicate between the parties concerning the subject-matter. Compare *Reynolds* v. *Stockton*, 140 U. S. 254, 268. Obviously, the deputy commissioner had not only the power but the duty to determine whether the employer-employee relation existed. When a duly constituted tribunal has jurisdiction of the parties and of the subject-matter, that jurisdiction is not impaired by errors, however grave, in applying the substantive law. *Dennison* v. *Payne*, 293 Fed. 333, 341. Compare *Chicago, Rock Island & Pacific Ry. Co.* v. *Schendel*, 270 U. S. 611, 617; *Marin* v. *Augedahl*, 247 U. S. 142, 149; *Binderup* v. *Pathé Exchange*, 263 U. S. 291, 305-307. This is true of tribunals of special as well as of those of general jurisdiction. It is true of administrative, as well as of judicial tribunals. If errors in the application of law may not be made the basis of collateral attack upon the decision of an administrative tribunal, once that decision has become final, no "jurisdictional" defect can compel the independent reëxamination in court, upon direct review, of the facts affecting such applicability.

The "judicial power" of Article III of the Constitution is the power of the federal government, and not of any inferior tribunal. There is in that Article nothing which requires any controversy to be determined as of first instance in the federal district courts. The jurisdiction of those courts is subject to the control of Congress.[22] Matters which may be placed within their jurisdiction may

[22]Turner *v.* Bank of North America, 4 Dall. 8, 10; United States *v.* Hudson & Goodwin, 7 Cranch. 32, 33; Shelden *v.* Sill, 8 How. 441, 449; Justices *v.* Murray, 9 Wall. 274, 280; Insurance Co. *v.* Dunn, 19 Wall. 214, 226; Stevenson *v.* Fain, 195 U. S. 165, 167; Kline *v.* Burke Construction Co., 260 U. S. 226, 234. It was not until the Act of March 3, 1875, c. 137, 18 Stat. 470, that Congress extended the jurisdiction of the circuit courts to "cases arising under the laws of the United States", thus permitting to be exercised "the vast range of power which had lain dormant in the Constitution since 1789".

instead be committed to the state courts. If there be any controversy to which the judicial power extends that may not be subjected to the conclusive determination of administrative bodies or federal legislative courts, it is not because of any prohibition against the diminution of the jurisdiction of the federal district courts as such, but because, under certain circumstances, the constitutional requirement of due process is a requirement of judicial process. An accumulation of precedents, already referred to,[23]

See Felix Frankfurter and James M. Landis, "The Business of the Supreme Court", pp. 65-68; Charles Warren, "Federal Criminal Laws and the State Courts", 38 Harv. L. Rev. 545. Large areas of the potential jurisdiction of the lower federal courts are now occupied by other tribunals. As to legislative courts, see Wilber Griffith Katz, "Federal Legislative Courts", 43 Harv. L. Rev. 894. Congress has repeatedly exercised power to exclude from the federal courts cases not involving the requisite jurisdictional amount. Cases arising under the Federal Employers' Liability Act are triable in either the state courts or the federal district courts. See Second Employers' Liability Cases, 223 U. S. 1, 56, 57-59; Douglas *v.* New York, New Haven & Hartford R. R. Co., 279 U. S. 377. So also cases under § 20 of the Seamen's Act, as amended by the Merchant Marine Act of 1920, § 33. Engel *v.* Davenport, 271 U. S. 33, 37; Panama R. R. Co. *v.* Vasquez, 271 U. S. 557, 562.

[23] See decisions and statutes collected in note 5, *supra*. So far as concerns the question here presented, it is immaterial whether the controversy is wholly between private parties or is between the Government and a citizen. The fact that litigation under the Longshoremen's Act is, in substance, between private parties (even though under § 21 (b) the deputy commissioner is the only necessary party respondent) does not warrant the inference that the administrative features of the Act present a question not heretofore decided. The tribunals in note 5, *supra*, listed deal with matters outside the scope of the doctrine recently examined in Ex parte Bakelite Corporation, 279 U. S. 438. While the opinion in that case referred to "various matters arising between the government and others" as appropriate for the cognizance of legislative courts, the reference was restricted to matters "which from their nature do not require judicial determination and yet are susceptible to it," the mode of determining which "is completely within congressional control". *Ibid.* at 451. The suggestion that due process does not require judicial process in any controversy to which the government is a party would involve a revision of historic conceptions of the nature of the federal judicial system. That all questions arising in the administration of the Interstate Commerce Act, for example, or between a taxpayer and the government under the tax laws, could be committed by Congress exclusively to executive officers, in respect to issues of law as well as of fact, has never been supposed. Thus there is no indication in the opinion in Ex parte Bakelite Corporation that the Commerce Court was a legislative court, although instances of the creation of such courts were considered in detail. See Wilber Griffith Katz, "Federal Legislative Courts," 43 Harv. L. Rev. 894, 914, 915.

has established that in civil proceedings involving property rights determination of facts may constitutionally be made otherwise than judicially; and necessarily that evidence as to such facts may be taken outside of a court. I do not conceive that Article III has properly any bearing upon the question presented in this case.

Seventh. The cases cited by the Court in support of its conclusion that the statute would be invalid if construed to deny a trial *de novo* of issues of fact affecting the existence of the employer-employee relation seem to me irrelevant. Most of those decisions dealt with tribunals exercising functions generically different from the function which Congress has assigned to the deputy commissioners under the Longshoremen's Act, and no question arose analogous to that now presented.

By the Longshoremen's Act, Congress created fact-finding and fact-gathering tribunals, supplementing the courts and entrusted with power to make initial determinations in matters within, and not outside, ordinary judicial purview. The purpose of these administrative bodies is to withdraw from the courts, subject to the power of judicial review, a class of controversy which experience has shown can be more effectively and expeditiously handled in the first instance by a special and expert tribunal. The proceedings of the deputy commissioners are endowed with every substantial safeguard of a judicial hearing. Their conclusions are, as a matter of right, open to reëxamination in the courts on all questions of law; and, we assume for the purposes of this discussion, may be open even on all questions of the weight of the evidence.

The administrative bodies in the cases referred to by the Court, on the contrary, are in no sense fact-gathering or fact-finding tribunals of first instance. They are tribunals of final resort within the scope of their authority. Their concern is with matters ordinarily outside of judicial competence,—the deportation of aliens, the enforcement of military discipline, the granting of land patents, and the use of the mails,—matters which are within the power of Congress to commit to conclusive executive determination. Compare *Ex parte Bakelite Corporation*, 279 U. S. 438, 451. Their procedure may be summary and frequently is.[24] With respect

[24]Compare Miller *v.* Horton, 152 Mass. 540, and Pearson *v.* Zehr, 138 Ill. 48, cited by the Court. These cases involved summary administrative action, and the complaining individuals had been given no opportunity to be heard on

to them, the function of the courts is not one of review but essentially of control—the function of keeping them within their statutory authority.[25] No method of judicial review of the administrative action had been provided by Congress in any of the cases cited, and the question of the power to confine review to the administrative record accordingly did not arise. In each case, the Court held that if the administrative officer had acted outside his authority, the unwritten law supplied a remedy, and that relief could be had, according to the nature of the case, on bill in equity or habeas corpus.[26] The question decided in each case was

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the question whether their property was in fact subject to the destruction ordered. The degree of finality appropriate in administrative action must always depend upon the character of the administrative hearing provided. Compare Dickinson, "Administrative Justice and the Supremacy of Law", pp. 260-261; E. F. Albertsworth, "Judicial Review of Administrative Action by the Federal Supreme Court," 35 Harv. L. Rev. 127, 152, 153. In most States, the tendency appears to be to deny the right, in a tort action against an administrative officer, to question the existence of the fact justifying his act, if a hearing was provided or if a suit for injunction could have been brought. See Freund, "Administrative Powers Over Persons and Property", pp. 248-252; Kirk v. Board of Health, 83 S. C. 372, 383. Compare North American Cold Storage Co. *v.* Chicago, 211 U. S. 306, 316, 317. In cases arising under the Workmen's Compensation Laws, where formal hearing is available, the Massachusetts and Illinois courts, in common with many others, have held the administrative finding of the fact of employment conclusive. Churchill's Case, 265 Mass. 117; Hill's Case, 268 Mass. 491; Cinofsky *v.* Industrial Commission, 290 Ill. 521; Franklin Coal Co. *v.* Industrial Commission, 296 Ill. 329.

[25] Compare Frankfurter and Davison, "Cases on Administrative Law", Preface, p. viii. See Albert Levitt, "The Judicial Review of Executive Acts", 23 Mich. L. Rev. 588, 595 *et seq.* This authority may embrace as well the determination of questions of law as of fact, depending upon the judicial construction given to the authority of the tribunal. Thus in In re Grimley, In re Morrissey, Noble v. Union River Logging Railroad, Smith v. Hitchcock, and Bates & Guild Co. *v.* Payne, all cited in note 26, *infra*, the Court recognised the conclusiveness of many decisions of law by the tribunals in question. Tribunals of this character are of course empowered, under ordinary circumstances, to make conclusive determinations of fact. See *e. g.*, Passavant v. United States, 148 U. S. 214, 219; Medbury v. United States, 173 U. S. 492, 497, 498; Silberschein v. United States, 266 U. S. 221, 225; Quon Quon Poy v. Johnson, 273 U. S. 352, 353.

[26](a) In Ng Fung Ho v. White, 259 U. S. 276, the statute authorized the deportation only of aliens, without provision for judicial review of the executive order. Act of February 5, 1917, c. 29, § 19, 39 Stat. 874,

that Congress should not be taken, in the absence of specific provision, to have intended to subject the individual to the uncontrolled action of a public administrative officer. See *American School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 94, 110. No comparable issue is presented here.

Reliance is also placed, as illustrative of the necessary independence of the federal judicial power, upon the decision in *Ohio Valley Water Co.* v. *Ben Avon Borough*, 253 U. S. 287.[27] That

889. Upon application for a writ of habeas corpus, by a person arrested who claimed to be a citizen, it was held that he was entitled to a judicial determination of that claim. No question arose as to whether Congress might validly have provided for review exclusively upon the record made in the executive department; nor as to the scope of review which might have been permissible upon such record.

(b) In re Grimley, 137 U. S. 147, and In re Morrissey, 137 U. S. 157, deal with the action of military tribunals. Military tribunals form a system of courts separate from the civil courts and created by virtue of an independent grant of power in the Constitution. Article I, section 8, clauses 14, 16. They have authority to determine finally any case over which they have jurisdiction; "and their proceedings . . . are not open to review by the civil tribunals, except for the purpose of ascertaining whether the military court had jurisdiction of the person and subject-matter, and whether, though having such jurisdiction, it had exceeded its powers in the sentence pronounced." Carter v. Roberts, 177 U. S. 496, 498; Grafton v. United States, 206 U. S. 333, 347. As Congress did not provide any method for review by the courts of the decision of military tribunals, all questions of law concerning military jurisdiction are open to independent determination in the civil courts; and the cases of In re Grimley and In re Morrissey, decide nothing more. Whether Congress could make the findings of "jurisdictional facts" of military tribunals conclusive upon civil courts is a question which appears never to have been raised.

(c) In Noble v. Union River Logging Railroad, 147 U. S. 165, 174, relief was granted by bill in equity to stay illegal and unauthorized action of the Secretary of the Interior in respect to the public lands, there being no method of judicial review prescribed by statute. Compare Smelting Company v. Kemp, 104 U. S. 636, 641.

(d) In Smith v. Hitchcock, 226 U. S. 53, 58, as in Bates & Guild Co. v. Payne, 194 U. S. 106, 109, 110, and American School of Magnetic Healing v. McAnnulty, 187 U. S. 94, 109, bills in equity were entertained to review acts of the Postmaster General alleged to be unauthorized, Congress not having provided any method of judicial review. In each case the question involved was stated to be one of law.

[27] The decision in the Ohio Valley Water Company Case has evoked extensive and varied comment. See, *e. g.*, Curtis, "Judicial Review of Commission Rate Regulation—The Ohio Valley Case", 34 Harv. L. Rev. 862; Alberts-

case, however, involved only the question of the scope of review, upon the administrative record, in confiscation cases. It held that the reviewing court must have power to weigh the evidence upon which the administrative tribunal entered the order. It decided nothing concerning the right to a trial *de novo* in court; and the opinion made no reference to such a trial. It could not have decided anything as to the effect of Article III of the Constitution. For the case came here from the highest court of the State, arose under the Fourteenth Amendment and did not relate to the jurisdiction of the lower federal courts. Moreover, in no event, can the issues presented in the review of rate orders alleged to be confiscatory, which involve difficult questions of mixed law and fact, be deemed parallel to those presented in the review of workmen's compensation awards.[28] Compare the issues in *Ohio Valley Water Co.* v. *Ben Avon Borough, supra,* with that in *Dahlstrom Metallic Door Co.* v. *Industrial Board,* 284 U. S. —.

Whatever may be the propriety of a rule permitting special reëxamination in a trial court of so-called "jurisdictional facts" passed upon by administrative bodies having otherwise final jurisdiction over matters properly committed to them, I find no warrant for extending the doctrine to other and different administrative

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worth, "Judicial Review of Administrative Action by the Federal Supreme Court", 35 Harv. L. Rev. 127; C. W. Pound, "The Judicial Power," 35 Harv. L. Rev. 787; Brown, "The Functions of Courts and Commissions in Public Utility Rate Regulations", 38 Harv. L. Rev. 141; Wiel, "Administrative Finality", 38 Harv. L. Rev. 447; Buchanan, "The Ohio Valley Water Company Case and the Valuation of Railroads," 40 Harv. L. Rev. 1033; Bentel, "Valuation as a Requirement of Due Process of Law in Rate Cases," 43 Harv. L. Rev. 1249; Green, "The Ohio Valley Water Case," 4 Ill. L. Q. 55; Freund, "The Right to a Judicial Review in Rate Controversies", 27 W. Va. L. Q. 207; Hardman, "Judicial Review as a Requirement of Due Process in Rate Regulation", 30 Yale L. J. 681; Isaacs, "Judicial Review of Administrative Findings", 30 Yale L. J. 781. No commentator, however, appears to have understood the decision as recognizing in any manner a right to trial *de novo* in court upon confiscation issues.

[28] It is cause for regret that the Court in determining this controversy should have declared, *obiter*, that in matters of State public utility regulation involving administrative action of a special character, and raising questions under a different constitutional provision, a mode of procedure is required contrary to that almost universally established under State law (see David E. Lilienthal, "The Federal Courts and State Regulation of Public Utilities", 43 Harv. L. Rev. 379, 412, 413), and calculated seriously to embarrass the operation of the administrative method in that field.

tribunals whose very function is to hear evidence and make initial determinations concerning those matters which it is sought to re-examine. Such a doctrine has never been applied to tribunals properly analogous to the deputy commissioners, such as the Interstate Commerce Commission, the Federal Trade Commission, the Secretary of Agriculture acting under the Packers and Stockyards Act, and the like.[29] Logically applied it would seriously impair the entire administrative process.[30]

Eighth. No good reason is suggested why all the evidence which Benson presented to the district court in this cause could not have been presented before the deputy commissioner; nor why he should have been permitted to try his case provisionally before the administrative tribunal and then to retry it in the district court upon additional evidence theretofore withheld. To permit him to do so violates the salutary principle that administrative remedies must first be exhausted before resorting to the court, imposes unnecessary and burdensome expense upon the other party and cripples the effective administration of the Act. Under the prevailing practice, by which the judicial review has been confined to questions of law, the proceedings before the deputy commissioners have proved for the most part non-controversial;[31] and

[29]But see Interstate Commerce Commission *v.* Louisville & Nashville R. R. Co., 227 U. S. 88, 92. The statement by Mr. Justice Lamar there, however, went no further than to indicate that in some circumstances the courts on review of orders of the Interstate Commerce Commission might pass an independent judgment upon the evidence adduced before the Commission. See also Interstate Commerce Commission *v.* Northern Pacific Ry. Co., 216 U. S. 538, 544; Manufacturers Ry. Co. *v.* United States, 246 U. S. 457, 488-490.

[30]See Dickinson, "Administrative Justice and the Supremacy of Law", p. 310.

[31]Out of the 30,383 non-fatal cases disposed of during the fiscal year ending June 30, 1931, the deputy commissioners held hearings in only 729, according to information furnished by the United States Employees' Compensation Commission. Compensation payments were completed in 11,776 cases, or 38.8 per cent of the total. In 17,328 cases, or 57 per cent, the injured employee failed to receive compensation because no time was lost, or less than seven days, on account of the injury. The balance of 1,279 cases, amounting to 4.2 per cent of the whole, were dismissed because they did not come within the scope of the law. Among the 18,607 non-compensated cases, formal claims were filed by the employee in only 1,025 instances. See, also, Report of the Compensation Commission, 1930, pp. 68-70.

relatively few cases have reached the courts.[32] To permit a contest *de novo* in the district court of an issue tried, or triable, before the deputy commissioner will, I fear, gravely hamper the effective administration of the Act. The prestige of the deputy commissioner will necessarily be lessened by the opportunity of relitigating facts in the courts. The number of controverted cases may be largely increased. Persistence in controversy will be encouraged. And since the advantage of prolonged litigation lies with the party able to bear heavy expenses the purpose of the Act will be in part defeated.[33]

In my opinion the judgment of the Circuit Court of Appeals should be reversed and the case remanded to the District Court, sitting as a court of equity, for consideration and decision upon the record made before the deputy commissioner.

Mr. Justice STONE and Mr. Justice ROBERTS join in this opinion.

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[32]For the fiscal year ending June 30, 1931, 101 new cases were filed in the district courts, out of a total of 30,489 cases disposed of. Report of the United States Employee's Compensation Commission, pp. 69, 71. For the three preceding years the number of cases filed in the courts was, respectively, 61, 58, and 15. Report, 1930, p. 62; *id.* 1929, p. 70; *id.* 1928, p. 34. The decision of the Circuit Court of Appeals in the case at bar declaring the right to a trial *de novo* was rendered November 17, 1930, and the first opinion of the District Court on May 27, 1929.

[33]How serious these consequences will be is a question of speculation; but it is plain that they will be aggravated by the inherent uncertainty in the scope of the doctrine announced. The determination of what facts are "jurisdictional" or "fundamental" is calculated to provoke a multitude of disputes. That there is a difference in kind, for example, between the defense that the injured claimant is not an employee, and that he was not acting as an employee when he was injured, or that there is a difference between the latter defense and the defense that the disability, if any, from which he suffers resulted only in part, or not at all, from the employment in which he claims to have suffered it, are propositions which employers will be unlikely to accept until they have submitted them to the decision of the courts. The effectiveness of this legislation will be lessened by this opportunity for barren controversy over procedural rights and by delayed or thwarted determination of substantive ones.